

**A Study of Court-Connected Arbitration  
in the Superior Courts of Arizona**

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## **Executive Summary**

### **I. Introduction: Arizona's Court-Connected Arbitration System**

Arizona has had mandatory, non-binding arbitration as a component of its civil court system for over three decades. The purpose of this alternative dispute resolution process is to provide for the efficient and inexpensive handling of small claims. By reducing the number of cases pending before judges, court-connected arbitration also is intended to expedite the disposition of civil cases that remain in the traditional litigation process.

In early 2004, the Supreme Court of Arizona's Administrative Office of the Courts commissioned a study to examine the current arbitration system to determine its efficiency and effectiveness as an alternative dispute resolution tool, as well as to ascertain user satisfaction with the process and its outcomes. This study accessed various sources of information to answer the following questions:

1. How do the different courts in Arizona administer their arbitration programs?
2. How are the arbitration programs performing?
3. How is court-connected arbitration viewed by lawyers?
4. What is the experience with court-connected arbitration in other states?

The structure of court-connected arbitration in Arizona, and the different ways it is administered throughout the state, is addressed in Section II of this Report. Section III examines the performance of arbitration programs through an analysis of civil case data. Section IV addresses how court-connected arbitration is viewed by lawyers, based on a survey of members of the State Bar of Arizona. Section V describes the structure and performance of court-connected arbitration in other states and notes similarities and differences with Arizona's program. Section VI sets forth the conclusions regarding court-connected arbitration in Arizona's Superior Courts.

## **II. The Structure of Court-Connected Arbitration in Arizona and Differences Among the Counties**

Court-connected arbitration is regulated statewide by its authorizing statute, A.R.S. §12-133, and by the Arizona Rules of Civil Procedure, Rules 72-76. The arbitration process is also governed by local rules of practice in each county. As a result, court-connected arbitration has the same basic structure across the state, but there are differences in how the programs operate from county to county.

Civil cases must be submitted to arbitration if no party seeks affirmative relief other than a money judgment and the amount in controversy is within the county's jurisdictional limit. Some counties, including Maricopa and Pima, set the jurisdictional limit for arbitration at \$50,000, which is the maximum allowed by statute. Other counties set the arbitration limit as low as \$10,000.

With every civil complaint, the plaintiff is required to file a certificate advising the court that the case is or is not subject to compulsory arbitration. If the defendant controverts the plaintiff's certificate, the issue of arbitrability is decided by the judge. In approximately half of the counties, including Maricopa, the court assigns the case to arbitration based on the certificates filed with the pleadings. In other counties, including Pima, cases are not assigned to arbitration until the motion to set and certificate of readiness for trial has been filed. A few counties assign cases to arbitration at points in between the pleadings and the motion to set.

Once a case is assigned to arbitration, court staff appoint an arbitrator from a list of arbitrators drawn from members of the state bar in that county with at least 4 years experience. In approximately half the counties, including Maricopa, arbitrator service is mandatory for most lawyers. In the remaining counties, arbitrator service is voluntary. Pima County adds lawyers to its arbitrator list when they make a civil court appearance or respond to a solicitation by one of the judges. Several counties, including Pima, attempt to match arbitrators with cases in their area of expertise; most counties, however, assign arbitrators on a random basis. Each party may exercise one peremptory strike or may disqualify the arbitrator for good cause. The arbitrator is empowered to make virtually all legal rulings in the case. Arbitrators may receive seventy-five dollars for each day spent hearing the case, to be paid from the county's general revenues.

According to the statewide rules, the arbitrator must fix a time for the hearing not less than 60 nor more than 120 days after his or her appointment. The arbitrator is required to file an award and final disposition of the case within a month of the hearing. Any party may appeal the arbitrator's decision for a trial *de novo* in Superior Court, but if the judgment is not at least 25% more favorable than the arbitration award, the appellant

may be required to pay the costs and fees incurred by the opposing party on appeal. If no appeal is taken, the arbitrator's award becomes binding as a decision of the Superior Court.

### **III. The Performance of Arbitration in Arizona's Superior Courts**

Information regarding the number and types of cases assigned to arbitration, the progression of those cases through the arbitration process, and their average time to disposition was obtained from a questionnaire sent to each court. More detailed information on these issues, as well as on cases subject but not assigned to arbitration, the timing of arbitration events, and on the time to disposition for arbitration and non-arbitration cases was obtained in only Maricopa and Pima Counties from the courts' database, supplemented with information from several case samples. Comparisons conducted across the counties to explore whether patterns in the caseload and disposition statistics correspond to differences in the counties' practices regarding case assignment and arbitrator service are only rough comparisons, as each statistic reflects the effects of a constellation of practices and factors, some of which are undoubtedly related to the courts' general case processing rather than to their arbitration procedures.

#### **The Arbitration Caseload**

The courts typically collect and report statistics on "arbitration cases" only after cases have been assigned to arbitration; cases subject to arbitration that conclude before assignment generally are not tracked as part of the "arbitration" caseload but instead as part of the "non-arbitration" caseload. Information on cases *subject* to arbitration was available only for Maricopa County.

Cases subject to arbitration comprised 42% of all filed civil cases in Maricopa County. However, civil cases categorized as "non-classified" (*e.g.*, petitions for name change, domestication of foreign judgment, forfeiture, forcible detainer, quiet title) typically were not subject and seldom were assigned to arbitration, although they made up a substantial proportion of the civil caseload. These non-classified civil cases seem likely to consume fewer judicial resources than would tort and contract cases. Accordingly, in assessing the arbitration program's potential effect on the courts' workload, it may be more meaningful to examine the proportion of the tort and contract caseload subject to arbitration, rather than the proportion of the total civil caseload. Cases subject to arbitration comprised 81% of the three primary case types: contract, tort motor vehicle, and tort non-motor vehicle cases. Using either calculation, cases *subject* to arbitration accounted for a substantial portion of civil cases.

Not all cases subject to arbitration, however, are likely to affect the workload of the courts or the arbitration programs. Approximately two-thirds of cases subject to arbitration in Maricopa County concluded prior to assignment to arbitration, primarily by default judgment (36%), dismissal for lack of service or lack of prosecution (28%), or settlement (29%). Although information was not available on the extent of court involvement in these cases, it seems likely that most required little court time. Most contract cases subject to arbitration concluded prior to assignment to arbitration, but a majority of tort cases did not. Only approximately one-third of cases subject to arbitration were *assigned* to arbitration.

The number of cases per county that were *assigned* to arbitration in 2003 varied considerably, ranging from three cases in La Paz County to almost 5,000 cases in Maricopa County. Across the counties, however, cases assigned to arbitration comprised a similar, and relatively small, proportion of the overall civil caseload: less than 8% in most counties and less than 15% in all counties. Specifically in Maricopa and Pima Counties, cases assigned to arbitration comprised 14% and 13%, respectively, of the civil caseload. There was no consistent pattern of differences in the proportion of cases assigned to arbitration between counties that assigned cases after the answer was filed and counties that assigned cases after the motion to set was filed.

Three case types – tort motor vehicle, tort non-motor vehicle, and contract cases – accounted for the majority of cases assigned to arbitration in all counties and for more than 85% of cases assigned to arbitration in all but two counties. In Maricopa and Pima Counties, for which more detailed information was available, tort motor vehicle cases alone comprised the majority of cases assigned to arbitration. Cases assigned to arbitration accounted for one-fourth of contract, tort motor vehicle, and tort non-motor vehicle cases in Pima and Maricopa Counties, and 4% to 18% of tort and contract cases in the other counties.

### **Progression and Final Disposition of Cases Assigned to Arbitration**

Based on data provided by the courts, an award was filed in a sizeable proportion of cases assigned to arbitration – in 31% to 63% of cases – in most counties. Specifically in Maricopa and Pima Counties, an award was filed in 43% and 42%, respectively, of cases assigned to arbitration. It is not clear why an award was filed in so many cases assigned to arbitration. As a basis of comparison, in most counties a trial was commenced in fewer than 5% of all civil cases and fewer than 9% of tort and contract cases.

There was no consistent pattern of differences in the proportion of cases in which an award was filed by whether counties assigned cases to arbitration earlier (after the answer was filed or at an early case management conference) versus later in the case

(after the motion to set was filed). Nor were there consistent patterns of differences in the hearing rate by whether counties relied on voluntary versus mandatory arbitrator service or whether they assigned arbitrators to cases according to their subject matter expertise. And in both Maricopa and Pima Counties, there were no differences among the three main case types (tort motor vehicle, tort non-motor vehicle, and contract cases) in the likelihood that cases assigned to arbitration settled before an award was filed.

Based on data from the courts, the percentage of cases in which the arbitration award was appealed ranged from 17% to 46%, and specifically was 22% in both Maricopa and Pima Counties. There was no consistent pattern of differences in the proportion of cases in which an appeal was filed by whether counties relied on voluntary or mandatory arbitrator service. In fact, some counties with mandatory arbitrator service had among the lowest appeal rates, whereas some counties that relied primarily on volunteer arbitrators had among the highest appeal rates. Nor was there a consistent pattern of differences in the proportion of cases in which an appeal was filed by whether the county assigned arbitrators to cases according to subject matter expertise. And in both Maricopa and Pima Counties, there were no differences among the three main case types (tort motor vehicle, tort non-motor vehicle, and contract cases) in the likelihood that the award was appealed.

Only a small proportion of cases in which the award was appealed proceeded to trial. In four counties, none of the appealed cases went to trial. In another four counties, including Maricopa County, 14% to 19% of the appealed cases went to trial; only one county had a higher rate of trial on appeal (27%). When calculated instead as the proportion of cases *assigned* to arbitration that went to trial, the trial rate was less than 4% in every county except one, where it was 8%.

And if calculated as the proportion of cases *subject* to arbitration, the trial rate in arbitration cases would be even lower. We were able to directly compare the dispositions of tort and contract cases that were subject versus not subject to arbitration only in Maricopa County. For both groups of cases, the trial rate was 1%. Three percent of cases subject to arbitration were resolved by summary judgment or some other non-trial judgment or order, compared to 8% of cases not subject to arbitration. Thirty-nine percent of cases subject to arbitration settled, compared to 55% of cases not subject to arbitration. Twelve percent of the cases subject to arbitration were resolved by the arbitration award. These findings suggest that arbitration diverted cases from settlement, not trial, and might have diverted some cases from other types of judgments.

## **Time to Disposition**

Data permitting the comparison of the time to disposition for tort and contract cases subject to arbitration versus not subject to arbitration were obtained only for Maricopa and Pima Counties. Because of differences between the courts in their disposition codes and the form in which the data were available, the types of dispositions included in these analyses in each county were somewhat different. Nonetheless, using a sample of tort and contract cases in both counties, cases subject to arbitration were resolved more quickly (on average, by three to five months) than were cases not subject to arbitration. However, because of differences in the amount in controversy between cases subject versus not subject to arbitration, and the likely associated differences in case complexity and the amount of discovery, the faster resolution of cases subject to arbitration can not necessarily be attributed to the arbitration process.

The seemingly faster resolution of cases subject to arbitration does not mean that those cases were resolved quickly. In fact, tort and contract cases subject to arbitration did not meet the case processing time standards set by the Arizona Supreme Court. In Maricopa County, where data were available for most disposition types, 56% of cases subject to arbitration were resolved within nine months, compared to the standard specifying that 90% of cases should be resolved within that time period.

Of course, for the subset of cases *assigned* to arbitration, the time to disposition was longer than for all cases subject to arbitration. In three of the eight counties for which time to disposition data were available, half of the cases assigned to arbitration concluded within five to seven months of the complaint. In four counties, including Maricopa and Pima Counties, half of the cases assigned to arbitration concluded within ten to fourteen months of the complaint. And in one county, half of the cases assigned to arbitration concluded within twenty-two months of the complaint. Assigning cases to arbitration after the answer was filed was often, but not always, associated with a shorter average time to disposition than later assignment. The findings of some relationship between the timing of assignment to arbitration and the time from complaint to disposition, however, might be an artifact of analyzing timing data only for cases *assigned* to arbitration.

In Maricopa and Pima Counties, more detailed information was available on the time to disposition for a sample of cases assigned to arbitration. In Maricopa County, 60% of cases assigned to arbitration concluded within one year of the complaint, 85% concluded within 18 months, and 94% concluded within two years. In Pima County, 38% of cases assigned to arbitration concluded within one year of the complaint, 77% concluded within 18 months, and 90% concluded within two years.

For these two counties, differences in the time to disposition of cases that concluded at different points in the arbitration process also were examined. In Maricopa County, cases assigned to arbitration that settled before an award was filed concluded, on average, about two months faster than cases resolved by the award. In Pima County, however, there was no difference in the time to disposition for these two groups of cases. Although the information in the case docket did not permit a systematic examination, in both counties most of the cases that settled tended to do so in unison with when hearings were scheduled. This pattern suggests that the hearing provided the event that stimulated settlement. Twenty-two percent of cases in Maricopa County settled within two months of the arbitrator's appointment; however, only 9% of cases in Pima County settled within that time period. Because the arbitrator is appointed much later in Pima County, this difference suggests that it was the stage of the litigation, rather than the appointment of the arbitrator, that produced the initial burst of settlement in Maricopa County.

In both counties, cases that were resolved by the filing of the arbitration award did not conclude faster than cases that settled after the award was filed but prior to appeal. However, in both counties, cases in which an award was filed and not appealed concluded six to eight months faster than cases in which the award was appealed and ultimately either settled or tried. In Maricopa County, for instance, cases that were resolved by the award concluded, on average, within 344 days of the complaint, compared to within 565 days for cases that settled after appeal. In Pima County, cases that were resolved by the award concluded, on average, within 416 days of the complaint, compared to within 642 days for cases that settled after appeal.

The longer-than-expected time to disposition for arbitration cases prompted a detailed examination of the progression of cases through the arbitration process and the length of time between the various arbitration events.

### **Time Between Arbitration Events**

To examine arbitration case processing in more detail, the length of time between various arbitration events was obtained from the case docket in a sample of tort and contract cases assigned to arbitration in Maricopa and Pima Counties. In Maricopa County, filing the answer triggered assignment to arbitration, and that occurred 67 days, on average, after the complaint was filed. In Pima County, by comparison, filing the motion to set triggered assignment to arbitration, and that occurred 176 days, on average, after the complaint was filed.

The initial arbitrator was appointed, on average, within approximately 47 days of the event that triggered arbitration assignment in both counties. Approximately one-third of cases in both counties (29% in Maricopa County and 36% in Pima County) involved



one or more re-appointments of the arbitrator. The similar rates of arbitrator re-appointment are interesting in light of differences between the counties in practices regarding arbitrator selection and assignment based on practice area. In cases that involved one or more arbitrator re-appointments, the average length of time between the first and final appointment of the arbitrator was 55 days in Maricopa County and 38 days in Pima County.

In all, the final appointment of the arbitrator took place, on average, within 129 days of filing the complaint in Maricopa County and within 238 days of filing the complaint in Pima County. This suggests, not surprisingly, that appointing the arbitrator after the answer (in Maricopa County) rather than after the motion to set (in Pima County) can start the arbitration process and its associated deadlines sooner.

After the arbitrator is appointed, the hearing is to take place within 120 days, unless the time frame is extended for good cause. The hearing was scheduled to take place by that deadline in under half of the cases in both counties (43% and 45%). These figures probably overestimate the number of hearings that took place within the 120-day deadline because arbitrators did not routinely file an amended notice of hearing when the hearing was rescheduled. In both counties, the hearing was scheduled to take place within 270 days of the final arbitrator appointment in 92% of cases. This similar pattern was observed, even though cases in Pima County had more time to conduct discovery prior to the appointment of the arbitrator. The case docket did not have sufficient information on continuances to examine what role they played in when the hearing took place.

The average length of time between the final arbitrator appointment and the scheduled hearing date was similar in the two counties (152 days and 148 days) despite differences in their practices. Maricopa County did not monitor the arbitrators' scheduling of the hearing, and requests for a continuance (other than to extend on the inactive calendar) were decided by the arbitrator. By contrast, the court in Pima County routinely sent a request for a status report if a hearing had not been held by the 120-day deadline, and requests for continuances were decided by a judge.

In Maricopa County, the scheduled hearing date was more than 270 days after the complaint in approximately half of the cases and more than 330 days after the complaint in approximately one-fourth of the cases. Thus, a motion to set the case for trial or to continue the case on the inactive calendar (which would require judicial involvement) must have been filed in a sizeable number of cases before the hearing was held. The issue of continuing the case on the inactive calendar did not apply in Pima County because a motion to set had to already be filed in every case in order to be assigned to arbitration. However, an even larger proportion of cases in Pima County, 62%, had a scheduled hearing date more than 330 days after the complaint.

After the hearing, the arbitrator is supposed to notify the parties of his or her decision in writing within 10 days. With the caveat that these data are likely to underestimate compliance with that deadline, particularly in Maricopa County, the notice of decision was filed within that time period in 43% of cases in Maricopa County and 60% of cases in Pima County. After the notice of decision, the award is to be filed within 25 days, and was filed within that time period in 63% of cases in Maricopa County and 81% of cases in Pima County. It is not clear whether the differences between the two counties in the apparent compliance with these deadlines reflected differences in their practices regarding arbitrator selection and assignment or in the data available in each county.

Overall, the award is to be filed within 145 days of the final arbitrator appointment. Only approximately 35% of awards in both counties were filed within this time frame. The award was filed, on average, within 191 days of the final arbitrator appointment in Maricopa County and within 199 days in Pima County. Most awards in both counties, 86% in Maricopa County and 83% in Pima County, were filed within 270 days of the final arbitrator appointment.

In sum, once cases were assigned to arbitration, the length of time between arbitration events was similar in Maricopa and Pima Counties. Thus, the longer time from complaint to final disposition observed in cases assigned to arbitration in Pima County versus Maricopa County appeared to be due largely to differences in the timing of the assignment of cases to arbitration (*i.e.*, after the motion to set versus after the answer, respectively).

#### **IV. Lawyers' Views of Court-Connected Arbitration**

All members of the State Bar of Arizona were invited in June 2004 to participate in a web-based and e-mail survey about court-connected arbitration in Arizona. The survey findings are based on the responses of 2,934 lawyers who had direct experience with the program (*i.e.*, 31% of State Bar members contacted). The proportion of lawyers responding from each of Arizona's fifteen counties was similar to the proportion of State Bar members in each county; thus, the majority of respondents were from Maricopa County. In this summary, we primarily present statewide findings with only a few examples of county differences.

The survey consisted of three main sections: the first focused on lawyers' experience as counsel in arbitration, the second focused on lawyers' experience as an arbitrator, and the third sought lawyers' views about aspects of arbitration program structure, arbitrator service, and program effectiveness. The number of respondents for

each section varied, as a given lawyer could be in a position to answer one, two, or all three sections. We summarize the findings of each section of the survey in turn.

### **Lawyers' Experience as Counsel in Arbitration**

\_\_\_\_\_ The first section of the survey was directed at lawyers who represented clients in arbitration and focused on their experience in their most recent case assigned to arbitration. A total of 905 lawyers responded to this section, half of whom had 25% or more of their caseload subject to arbitration and a majority of whom had a civil litigation practice. The lawyers were evenly divided between those who represented the plaintiff and those who represented the defendant in their most recent case in arbitration, except in Pima County, where almost two-thirds had represented the plaintiff.

In their most recent case in arbitration, almost one-third of the lawyers struck an arbitrator, primarily due to concern about the arbitrator's potential bias. A majority of lawyers reported that one or more continuances were granted, which were primarily sought because of scheduling conflicts or the need for additional information for the hearing. There were no differences between Maricopa and Pima Counties in the proportion of cases involving a strike or a continuance, even though Pima County matched arbitrators to cases based on subject matter and assigned cases to arbitration later in litigation.

Most counsel had highly favorable assessments of the arbitration process: they felt they could fully present their case during the hearing, the hearing process was fair, the arbitrator was not biased, and the other side participated in good faith. Lawyers' views of the arbitrator's level of preparation and knowledge of the issues and arbitration procedures were more mixed; few, however, had unfavorable assessments of either the process or the arbitrator.

A majority of the lawyers said that the award was fair and was the same or better than the expected trial judgment, and that their client was satisfied with it. A sizeable minority of lawyers, however, had unfavorable assessments of the award. Among lawyers in cases that did not accept the arbitrator's award, a majority felt the award made no contribution to settlement negotiations.

Lawyers' views of the extent to which the arbitrator understood the issues, was unbiased, was prepared, and knew arbitration procedures were strongly related to lawyers' perceptions that the hearing process and the award were fair. And lawyers' perceptions of the award, the arbitrator's understanding of the issues, and the neutrality and fairness of the arbitrator and the hearing were related to whether lawyers appealed the award.

Lawyers in Pima County tended to have more favorable assessments of the arbitrator and the process than did lawyers in Maricopa County and the other counties. There were no county differences, however, in lawyers' views of the award. Although Pima and Maricopa Counties employed different practices regarding arbitrator selection and assignment, the composition of survey respondents in the two counties also differed. A larger proportion of survey respondents in Pima than in Maricopa County were plaintiffs' counsel and had not appealed the award, both of which were associated with more favorable views. Analyses suggested that differences among the counties in lawyers' views of arbitration were largely, but not entirely, due to these differences in the composition of the survey respondents.

### **Lawyers' Experience as Arbitrators**

The second section of the survey focused on lawyers' experience in the most recent case in which they were appointed as an arbitrator. A total of 2,016 lawyers responded to this section, most of whom had served as an arbitrator in one to four cases in the preceding two years. However, unlike the lawyers who responded to the counsel section of the survey, a majority of the arbitrators had little or no experience as counsel in the arbitration process and did not have a civil litigation practice.

Consistent with differences in the courts' practices regarding assigning arbitrators to cases based on subject matter, a majority of arbitrators in Pima County, but fewer than half in Maricopa County and the other counties, said they were very familiar with the subject area in the most recent case they arbitrated. Statewide, a majority of arbitrators felt they had sufficient information about arbitration procedures to conduct an adequate hearing and sufficient information about the facts and the law to reach an informed decision. Not surprisingly, arbitrators in transactional/criminal law practice were less likely than arbitrators in civil litigation practice to be familiar with the law and arbitration procedures and were more likely to report difficulty ruling on motions and dealing with evidentiary and procedural issues.

A majority of arbitrators reported some or a great deal of difficulty scheduling the hearing. One-third ruled on one or more pre-trial motions in their most recent case. Although most arbitrators felt both parties participated in good faith, a number remarked on other problems, including the lawyers' lack of preparation, minimal case presentation, and intent to appeal regardless of the award. A majority of the arbitration hearings lasted two to four hours.

Most arbitrators who did not hold a hearing spent two hours or less on the case. Approximately half of the arbitrators who held a hearing spent a total of five to eight hours on the case, and over one-third spent more than eight hours on the case. Arbitrators

who were unfamiliar with arbitration procedures or the area of law or who felt they did not have sufficient information to decide the case spent on average three to five hours longer on cases. A majority of arbitrators in Maricopa County did not submit an invoice for payment, while a majority in the other counties received \$75 for their service.

### **Lawyers' General Views of Arbitration**

The final section of the survey sought lawyers' views regarding aspects of program structure, arbitrator service and compensation, and program effectiveness. A total of 2,515 lawyers who had direct experience with court-connected arbitration, primarily as arbitrators rather than as counsel, responded to this section.

Lawyers thought that several aspects of the structure of court-connected arbitration should remain unchanged. A majority of lawyers thought arbitration use should remain mandatory, the jurisdictional limit should remain unchanged, and the time frame for the hearing was about right. Interestingly, there were no differences between lawyers in Maricopa and Pima Counties in their views of the time frame, even though arbitration hearings in Pima County cases generally were held later in the course of litigation. If arbitration use were made voluntary, a majority of lawyers said they would sometimes or often recommend arbitration to their clients.

However, a majority of lawyers thought arbitration should be replaced by a different type of mandatory ADR process, such as mediation, settlement conference, early neutral case evaluation, or short-trial, to be conducted by *pro tem* judges, commissioners, or other staff neutrals. And just over half of the lawyers thought the appeal disincentive should be changed, although they were split between favoring an increase in the percentage by which an appealing party must improve its outcome versus favoring a decrease in that percentage or abolishing the disincentive altogether.

And a majority of lawyers did not support the current approach to arbitrator service and compensation used in most counties. Most lawyers thought that arbitrator compensation should be changed, either to a reasonable hourly rate for all time spent on the case or to no pay but non-monetary benefits, such as CLE credit or designation as a *pro tem* judge. And a majority of lawyers thought that arbitrator fees should be obtained from sources other than the court's budget, either split equally by the parties or assessed as a taxable cost against the losing party. In addition, a majority of lawyers thought that arbitrators should serve voluntarily, be assigned to cases based on subject matter expertise, and receive arbitration training before serving. Fewer than half of the lawyers said they would be somewhat or very likely to serve voluntarily at the current rate of pay.

Just over one-third of the lawyers thought arbitration was effective in reducing litigant costs, resolving cases faster, ensuring a fair hearing, or providing an evaluation to facilitate settlement. Approximately half of the lawyers felt arbitration was effective in allowing the court to devote more resources to cases not subject to arbitration, but only 25% thought it was effective in reducing disposition time in those cases. Although for most of the goals the percentage of lawyers who thought arbitration was effective was larger than the percentage who thought it was ineffective, a fairly sizeable proportion gave neutral responses. Lawyers in Pima County tended to rate arbitration as more effective than did lawyers in the other counties. To some degree, however, county differences in lawyers' views reflected differences in the composition of the survey respondents.

## **V. Court-Connected Arbitration Programs in Other States**

### **The Structure of Court-Connected Arbitration**

Court-connected arbitration in most other states is similar in scope to that in Arizona. To exclude the more complex civil cases, a majority of programs establish jurisdictional limits at or below \$50,000, and most programs exclude cases that seek injunctive or other equitable relief. Although participation in court-connected arbitration is mandatory within the jurisdictional limit, several states, including Arizona, allow parties to bypass arbitration by agreeing to participate in some other alternative dispute resolution process.

Almost all states require their arbitrators to be experienced lawyers or retired judges, but only two require their arbitrators to have expertise in the subject area of the cases they will hear. Most states require their arbitrators to have more experience than Arizona does, either by requiring more years of experience or specifying litigation or trial practice experience. Notably, only two other states have a provision like the one in Arizona that allows courts to require lawyers to serve as arbitrators, and only two other states pay their arbitrators less than or the same as Arizona does. States that compensate their arbitrators at the highest levels typically require the parties to bear the expense of the arbitrator's fee.

Almost all states have adopted rules to make the hearing and appeal process more efficient and less expensive than traditional litigation while preserving the parties' right to have their case tried in court. This is accomplished in several ways. First, most states impose a deadline by which the arbitration hearing must be conducted, either within six months to a year of filing or within two to four months after the arbitrator is appointed. Second, many states allow arbitrations to be conducted without strict adherence to the

court rules governing discovery and the presentation of evidence. Third, every state allows parties the right to appeal the arbitration award to court for a trial *de novo*. However, to discourage appeals from being filed routinely, states often impose a requirement that the appealing party must improve its position at trial or be liable for the opposing party's fees and costs. In each of these respects, Arizona's program is typical.

### **The Performance of Court-Connected Arbitration**

On every dimension of program performance, the research findings were mixed with regard to whether arbitration outperformed or simply did as well as traditional litigation. Our ability to draw conclusions about the relative effectiveness of court-connected arbitration versus traditional litigation was limited by the small number of studies with reliable comparative data for arbitration-eligible cases that did not go through arbitration. Few studies have systematically assessed the impact of different program structures on case processing or program performance. Because the arbitration programs differed on multiple dimensions, clear conclusions about the effects of any single program feature cannot be drawn by comparing findings across the programs. Most of the studies were conducted over a decade ago; thus, their conclusions about the arbitration programs' performance may not apply to the programs as they currently operate.

Case processing statistics were examined to get a sense of the progression of cases through the arbitration process. The percentage of arbitration cases that went to a hearing ranged from 15% to 64%, the percentage of awards appealed ranged from 19% to 78%, and the percentage of appealed cases that had a trial *de novo* ranged from 3% to 45%. In most programs, defendants filed the majority of appeals, and they tended to improve their position at trial *de novo*. Both the hearing rate and the appeal rate tended to be higher for higher dollar-value cases, but did not vary by case type. The trial *de novo* rate, but not the appeal rate, seemed to vary depending on the appeal disincentive.

Five studies reported that the time to disposition was shorter for arbitration cases than for comparable cases not in arbitration, typically by three to seven months. Three studies, however, found no differences in the time to disposition. The program features that were more likely to be present in programs in which arbitration reduced the time to disposition than in programs that reported no time savings included discovery limits or arbitrator control of discovery, relatively short deadlines by which the arbitration hearing was to be held, and court coordination or scheduling of the arbitration hearing.

The point in the arbitration process at which cases were resolved affected their time to disposition. Arbitration cases that settled before the arbitration hearing tended to conclude two to six months faster than cases that went to a hearing. And cases that accepted the arbitration award were resolved three to ten months faster than cases that

requested a trial *de novo*. Among appealed cases, those that settled before trial did not tend to conclude faster than those that went to trial.

Few studies examined arbitration's impact on court resources, and the findings of those that did tended to be mixed. The trial rate in arbitration cases was lower than in non-arbitration cases in four studies, but two other studies found no differences. More arbitration cases than non-arbitration cases had a hearing on the merits in all studies; whether the settlement rate in arbitration was lower or the same as in non-arbitration cases varied across the studies. The introduction of an arbitration program did not appear to reduce the time to disposition for non-arbitration cases or the pending caseload.

Arbitration did not reduce the hours lawyers worked or the fees they billed. In a program in which the arbitrator controlled discovery, the number of depositions and discovery costs was lower in arbitration than in non-arbitration cases. Lawyers were fairly evenly split between whether they thought their hours, fees, or litigation costs were the same or were lower in arbitration than if the case had not been in arbitration. Lawyers tended to think they spent as much time on various litigation tasks in arbitration cases as they would have if the cases were not subject to arbitration. Among arbitration cases, discovery costs and lawyers' hours and fees were lower in cases that settled before an arbitration hearing than in cases that had a hearing, and were slightly lower in cases that accepted the award than in cases that appealed the award and subsequently settled.

Lawyers who represented clients in cases in court-connected arbitration had highly favorable assessments. Most thought the arbitration rules and procedures were fair, the arbitrator was impartial, and the award was fair. A majority of lawyers had favorable ratings of the arbitrator's level of preparation, understanding of the factual and legal issues, and knowledge of procedures, but these ratings tended to be slightly lower than their fairness ratings. Where there were differences in their views, plaintiffs' lawyers had more favorable views than defense lawyers. In addition, the lawyers tended to have more favorable views than their clients. Lawyers whose cases settled before an arbitration hearing were more satisfied with the outcome than were lawyers whose cases went to the hearing. Studies that compared the views of lawyers in arbitration cases with those of lawyers in non-arbitration cases, however, either found no differences in their views or found that lawyers in arbitration cases had less favorable assessments than lawyers in non-arbitration cases.

A majority of litigants whose cases went to an arbitration hearing thought the arbitration process was fair and that the arbitrator was impartial, adequately prepared, and understood the facts and the law. Fewer litigants, though still a majority, thought the arbitration award was fair and were satisfied with it. Arbitration litigants whose cases settled before an arbitration hearing tended not to differ in their assessments of the



outcome from litigants whose cases were resolved at or after a hearing, but litigants whose cases were resolved by trial *de novo* had more favorable views than did litigants whose cases were resolved by the award. Studies that compared the views of litigants in arbitration cases with those of litigants in non-arbitration cases reported mixed findings with regard to which group had more favorable assessments.

## **VI. Conclusion**

The primary goals of court-connected arbitration in Arizona's Superior Courts include providing the faster and less expensive resolution of cases within the arbitration jurisdictional limit, as well as freeing up judicial resources to help relieve court congestion and delay for cases above the jurisdictional limit. Given the arbitration program's reliance on members of the State Bar of Arizona to serve as arbitrators, as well as the program's impact on those lawyers who represent clients in arbitration, lawyers' views are likely both to reflect and affect how well the arbitration system is performing.

Does arbitration resolve cases faster? Because there is no comparison group of cases under the arbitration jurisdictional limit that is resolved without the arbitration program, it is necessary to compare the time to disposition for cases subject to arbitration with cases above the jurisdictional limit that are resolved via the traditional litigation track. Tort and contract cases subject to arbitration are resolved several months faster than tort and contract cases not subject to arbitration. However, because of differences in the amount in controversy between cases subject versus not subject to arbitration, and the likely associated differences in case complexity and the amount of discovery, the faster resolution of cases subject to arbitration can not necessarily be attributed to the arbitration process. Moreover, cases subject to arbitration are not resolved quickly; in fact, they do not come close to meeting the Arizona Supreme Court's case processing time standard of resolving 90% of cases within nine months of filing the complaint. And the time to disposition is even longer for the subset of cases subject to arbitration that are still active at the time of assignment to arbitration.

What explains the long time to disposition for cases assigned to arbitration? First, it takes several months for an arbitrator to be appointed in a majority of cases; in the one-third of cases in which an arbitrator is struck or excused, it takes another month or two before a final appointment is made. Second, a sizeable proportion of cases do not settle before a hearing, and those that do tend to settle close to the hearing date. Third, fewer than half of the cases meet the statutory deadline by which the hearing is to take place; a majority of cases involve one or more continuances. Fourth, in a minority of cases the statutory deadlines for the arbitrator's filing the notice of decision and the award are not met. Fifth, a request for trial *de novo* (which is filed in 17% to 46% of cases, depending

on the county) adds six to eight months to the time to disposition, even though few appeals proceed to trial.

What is arbitration's impact on court resources? Because there is no comparison group of cases under the arbitration jurisdictional limit that is resolved without the arbitration program, it is necessary to estimate arbitration's impact on court resources from caseload and case processing statistics. The percentage of the courts' civil caseload that is diverted from the traditional litigation track to the arbitration program can provide a sense of arbitration's potential impact on the courts' caseload. Based on data from Maricopa County, the only county for which data on cases subject to arbitration were available, cases *subject* to arbitration comprise approximately 40% of all civil cases and 80% of tort and contract cases. Thus, a substantial proportion of the civil caseload is diverted to the arbitration program. Not all cases subject to arbitration use a substantial amount of court resources or would be likely to do so if there were no arbitration program. Thus, the *caseload* figures are not sufficient to provide a sense of arbitration's impact on the court's *workload*. Among cases subject to arbitration, there are three categories of case dispositions that impact court resources differently.

The first category of cases consists primarily of cases that are abandoned, dismissed or settled without assignment to arbitration. Based on a sample of Maricopa County tort and contract cases, these cases comprise the majority of cases subject to arbitration (61%). Cases that conclude prior to assignment to arbitration are resolved with presumably little involvement of the court and with no involvement of the arbitration program. If there were no arbitration program, it is reasonable to assume that most of these cases would resolve in the same fashion and with a similar, minimal level of court interaction, although a few might resolve even earlier. Thus, the arbitration program is unlikely to affect the amount of court resources used by this set of cases. An additional 5% of cases subject to arbitration are abandoned or dismissed after assignment to arbitration and before a hearing; presumably, the arbitration program also has no net effect on the court resources used by those cases.

The second category of cases are those in which parties appeal the arbitration award for a trial *de novo*. These cases represent a small proportion of tort and contract cases subject to arbitration (4%), and they presently consume considerable court resources. Most appealed cases are resolved before trial; however, some of them probably use court resources – either through settlement conferences or pretrial hearings – before they are dismissed. Again, it seems reasonable to assume that if there were no arbitration program, most of the appealed cases would resolve in the same fashion and with no less court interaction than at present. Some of these cases might in fact require additional court involvement as they would not have had the potential benefit of an arbitration hearing and award to help in the settlement process. However, the main

savings in court resources the arbitration program provides for this group of cases is probably limited to pre-trial motions decided by the arbitrator, which occurs in approximately one-third of cases.

This leaves a third category of cases – those that settle after assignment to arbitration but before a hearing (14% of tort and contract cases subject to arbitration) and those that proceed to an arbitration hearing and either accept the award (12%) or settle before appeal (4%). At present, these cases use few court resources. Given that most contested tort and contract cases that are *not* subject to arbitration settle before trial, it seems reasonable to assume that these cases that presently settle without appeal also would settle if there were no arbitration program. The uncertainty is what level of court resources they would use before they settle. The arbitration program reduces court resources that would be required to decide pre-trial motions currently heard by arbitrators, which is in approximately one-third of these cases. Cases that presently settle prior to the arbitration hearing probably would settle without judicial intervention, although some might not settle until some court event has been scheduled. Cases that presently have an arbitration hearing and either accept the award or settle before appeal probably would use more court resources before they settle, and some might need a settlement conference or even a trial to reach resolution. Thus, the arbitration program's main potential for reducing court resources is for this subset of cases subject to arbitration (16%) that go to hearing but do not appeal.

What is arbitration's impact on litigants' costs? The present study could not examine this question directly; however, the preceding discussion of case processing provides some basis for estimating it. Arbitration is unlikely to have an impact on the litigation costs of most cases subject to arbitration that resolve without a hearing, as they would be likely to involve the same level of litigation activity as at present if there were no arbitration program. Thus, arbitration's primary potential to affect litigants' costs involves the 20% of tort and contract cases subject to arbitration that have a hearing. Given that most contested tort and contract cases that are *not* subject to arbitration settle without trial, it seems reasonable to assume that most of these cases would also settle without trial if there were no arbitration program. Accordingly, arbitration's impact on the costs for these litigants would depend on the relative transactional costs associated with an arbitration hearing versus settlement in the absence of the arbitration program. Overall, arbitration seems unlikely to decrease litigants' costs and could potentially increase costs, especially for the small group of litigants who appeal the award.

How do members of the State Bar of Arizona view court-connected arbitration? Lawyers who represent clients in arbitration have highly favorable assessments of the fairness of the arbitration process and neutrality of the arbitrator, and a majority think the awards are fair. A majority of lawyers feel arbitration use should remain mandatory, the

jurisdictional limit should remain the same, and the time frame for the hearing is about right (despite the fact that a majority seek continuances). If arbitration use were made voluntary, a majority of the lawyers who represent clients in arbitration say they would sometimes or often recommend arbitration to their clients.

However, a majority of lawyers think arbitration should be replaced by a different type of mandatory ADR process, such as mediation, settlement conference, early neutral case evaluation, or short-trial, to be conducted by *pro tem* judges, commissioners, or other staff neutrals. And just over half of the lawyers think the appeal disincentive should be changed, although they are split between favoring an increase in the percentage by which an appealing party must improve its outcome versus favoring a decrease in that percentage or abolishing the disincentive altogether.

Both counsel representing clients in arbitration and lawyers serving as arbitrators express concerns about the adequacy of arbitrators' knowledge of the issues, arbitration procedures, and civil procedure more generally, and a majority support training for arbitrators and assignment based on subject matter expertise. Although most arbitrators feel both parties participate in good faith, a number identify other problems, including the attorneys' lack of preparation, minimal case presentation, and intent to appeal regardless of the award.

Many lawyers are dissatisfied with being required to serve as arbitrators, especially given the time they put into these cases and the pay they receive. A majority of arbitrators report difficulty scheduling the hearing. Most arbitrators spend more than half a day on cases that go to a hearing, and over one-third spend more than a day. Arbitrators who are unfamiliar with arbitration procedures or the area of law spend more time on cases than those with greater familiarity. A majority of arbitrators in Maricopa County do not bother to submit an invoice for payment, while a majority in the other counties receive \$75 for their service. A majority of lawyers think arbitrator service should be voluntary, and most think arbitrator compensation should be changed, either to a reasonable hourly rate for all time spent on the case or to no pay but non-monetary benefits. Fewer than half of the lawyers say they would be somewhat or very likely to serve voluntarily at the current rate of pay.

Are variations in program structure across the counties associated with differences in program performance? Whether courts assign cases to arbitration after the answer is filed or after the motion to set is filed does not seem to affect the proportion of civil cases assigned to arbitration, the hearing rate, or the speed with which cases progress once assigned to arbitration. Earlier assignment to arbitration, however, generally is related to a shorter time interval between the complaint and final disposition. Courts that monitor the hearing date and require a judge rather than the arbitrator to decide requests for a

continuance do not find enhanced compliance with arbitration deadlines. Whether courts rely on voluntary versus mandatory arbitrator service or whether they assign arbitrators to cases according to their substantive expertise does not seem to affect the proportion of cases that strike an arbitrator, go to hearing, or appeal the award. Assigning arbitrators based on subject matter is related to arbitrators' familiarity with the law in the case and familiarity with arbitration procedures, but not with counsels' assessments of the award.

How does the structure of Arizona's court-connected program compare to that of programs in other states? Arizona's program is fairly typical in terms of its jurisdictional limit, exclusion of cases seeking equitable relief, deadline for scheduling a hearing, relaxed hearing procedures, and disincentive for requesting a trial *de novo*. However, Arizona's program tends to differ on most aspects of arbitrator service, including allowing courts to require lawyers to serve as arbitrators, setting lower experience requirements for its arbitrators, and paying arbitrators less than most other states.

What light do studies conducted on arbitration programs in other states shed on the performance of court-connected arbitration generally? The research findings were mixed with regard to whether arbitration outperformed or simply did as well as traditional litigation on every dimension of program performance – time to disposition, use of court resources, litigant costs, and lawyers' and litigants' views of arbitration. This suggests that arbitration's effectiveness might depend on the structure of the arbitration program as well as the larger court case management context and legal practice culture in which it operates. Unfortunately, studies have not systematically examined the effect of these factors on arbitration program performance.

In sum, both in Arizona and in other states, court-connected arbitration does not appear to have a negative effect on the speed or cost of dispute resolution, use of court resources, or satisfaction of participants in most cases. It is less clear, however, whether court-connected arbitration substantially improves the efficiency or effectiveness of dispute resolution.

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# I. Introduction

Arizona has had mandatory, non-binding arbitration as a component of its civil court system for over three decades.<sup>1</sup> Pursuant to this system, cases under a prescribed jurisdictional limit must be submitted to a neutral attorney for adjudication under relaxed rules of evidence and procedure. While any party may appeal the arbitrator's award for a trial *de novo* in Superior Court, absent an appeal, the arbitrator's decision is entered as the judgment of record in the case.

The Supreme Court of Arizona has recognized that the purpose of this alternative dispute resolution process is "to provide for the efficient and inexpensive handling of small claims."<sup>2</sup> By reducing the number of cases pending before judges, court-connected arbitration also is intended to expedite the disposition of civil cases that remain in the traditional litigation process.<sup>3</sup>

The arbitration rules have evolved over their 30-plus year history, primarily in response to the Supreme Court's recognition of specific procedural weaknesses.<sup>4</sup> Most significantly, the rules were overhauled in 1990 and 1991 to address "increasing concern... that appeals from arbitration awards were frequently used 'to delay proceedings and extort settlements,'" and to prevent the "significant waste of resources" resulting

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<sup>1</sup>The statute authorizing court-connected arbitration, A.R.S. §12-133, was originally enacted in 1971, allowing counties to refer civil cases involving \$3,000 or less in controversy to arbitration. The statute was amended in 1978 to increase the jurisdictional limit to \$5,000. It was amended again in 1984 and 1986, each time increasing the authorized jurisdictional limit, first to \$20,000 then to \$50,000, where it now remains. See Historical and Statutory Notes to A.R.S. §12-133 (West Annotated, 2004).

To implement this statute, the Supreme Court of Arizona adopted the Uniform Rules of Procedure for Arbitration in 1974. As part of the effort to consolidate various sets of procedural rules, the Uniform Rules were blended into the Arizona Rules of Civil Procedure in 2000, becoming Rules 72-76, Ariz.R.Civ.P. See, State Bar Committee Note to 2000 Promulgation and Amendments, Ariz.R.Civ.P.72.

<sup>2</sup> Ariz.R.Civ.P. 74(a).; see also *Martinez v. Binsfield*, 196 Ariz. 466, 467, 999 P.2d 810, 811 (2000)("Relatively small claims are subject to compulsory arbitration because it is thought that something short of a full-blown adversary proceeding is a more efficient and cost-effective way of resolving such disputes."); *Lane v. City of Tempe*, 202 Ariz. 306, 308, 44 P.3d 986, 988 (2002)("the primary goal of arbitration [is] a reduction of costs and delay associated with litigating smaller controversies.").

<sup>3</sup>See, Report of the Arizona Supreme Court Commission on the Courts, 1989, §4.2 at p.35.

<sup>4</sup>See, e.g., *Lane v. City of Tempe*, *supra*, 202 Ariz. at 307, 44 P.3d at 987.



from “the purposeful failure of attorneys and their clients to actively participate in arbitration hearings, relying instead on their appeal rights to secure a trial *de novo*.”<sup>5</sup> The 1991 amendments to the arbitration rules resulted in large part from the work of the Supreme Court’s 1990 Committee to Study Civil Litigation Abuse, Cost and Delay (also known as “the Zlaket Committee”).

Judge Robert Myers, former Presiding Judge in Maricopa County, addressed some of the information provided to this Committee in *MAD Track: An Experiment in Terror*:<sup>6</sup>

Court administrators and civil department judges in Maricopa County had, for some time, recognized substantial deficiencies in the Arbitration Rules. The deficiencies associated with the Arbitration Rules were as follows:

1. The procedure for appointment was burdensome and therefore protracted;
2. The request for arbitration, although permissive at any time subsequent to the filing of answer, was not being filed by the parties until the end of the pretrial discovery process;
3. The pool of arbitrators was inadequate—a party could remove any lawyer from the pool by a simple request;
4. The procedural rules, although simplified, permitted and even encouraged arbitrators to be dilatory in holding hearings and filing awards;
5. The right to appeal was without penalty and, therefore, parties frequently used it to delay the proceedings and extort settlements; and
6. Lawyers refused to attend hearings, being content with their appellate right to a *de novo* trial—the waste to the system as a result was obvious.

The revised rules have been in place for over a decade with little substantive change. The presumption that the amended rules governing arbitration now provide a more efficient way of resolving smaller cases has never been systematically examined nor tested.

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<sup>5</sup>*Id.*, citing Hon. Robert D. Myers, *MAD Track: An Experiment in Terror*, 25 Ariz.St.L.J. 11, 14 (1993).

<sup>6</sup> Myers, *supra*, 25 Ariz.St.L.J. at 14.

In early 2004, the Supreme Court of Arizona's Administrative Office of the Courts commissioned a study "to examine the current arbitration system to determine its efficiency and effectiveness as an alternative dispute resolution tool, as well as litigant and attorney satisfaction with the process, including the overall results of such proceedings."<sup>7</sup> This study accessed various sources of information to answer the following questions:

1. How do the different courts in Arizona administer their arbitration programs?
2. How are the arbitration programs performing?
3. How is court-connected arbitration viewed by lawyers?
4. What is the experience with court-connected arbitration in other states?

Section II of this Report addresses the structure of court-connected arbitration in Arizona, based on statewide rules, and the different ways it is administered throughout the state, based on information collected from court personnel. Thirteen of the fifteen counties in Arizona administer a court-connected arbitration program, and each program is different. Judges and court administrators from each of these counties were interviewed or surveyed to obtain information about the design and performance of the arbitration program in their county.

Section III of this Report examines the performance of arbitration programs through an analysis of civil case data. Caseload statistics for all civil cases and for cases assigned to arbitration were reviewed for each county. Most of the counties with arbitration programs provided information concerning the progression of cases through arbitration. In addition, the case files of a sample of civil lawsuits recently terminated in Maricopa and Pima Counties were examined in detail to collect data concerning the progress of cases through the court system, the time-to-disposition in both arbitration and non-arbitration cases, and the timing between various events in cases assigned to arbitration.

Section IV addresses how court-connected arbitration is viewed by lawyers, based on a survey of members of the State Bar of Arizona. Lawyers who had recently represented a party in court-connected arbitration and lawyers who had recently served as arbitrators were asked to provide detailed information about their experiences in these cases. In addition, lawyers with any experience in court-connected arbitration were asked their opinions about various aspects of the program in their county and invited to share their views about its effectiveness.

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<sup>7</sup>Arbitration Study: Preliminary Proposal, copy on file with authors.

Section V of this Report compares the Arizona programs to court-connected arbitration in other states. Statutes and court rules from around the country were reviewed to identify the structure of other court-connected arbitration programs. In addition, the findings of empirical studies of other states' arbitration programs were examined.

Section VI sets forth the conclusions about the performance of court-connected arbitration in Arizona's Superior Courts.

## **II. The Structure and Procedure of Court-Connected Arbitration in Arizona**

Court-connected arbitration is regulated statewide by its authorizing statute, A.R.S. §12-133, and by the Arizona Rules of Civil Procedure, Rules 72-76. The arbitration process is also governed by local rules of practice in each county. As a result, court-connected arbitration has the same basic structure across the state, but there are differences in how the programs operate from county to county. The most significant differences among the counties are in the following categories: the jurisdictional limit for arbitration (ranging from \$10,000 to \$50,000), when the case is assigned to arbitration (from after the pleadings to after the motion to set is filed), the pool of lawyers from which arbitrators are assigned (most attorneys or a select category), how arbitrators are appointed to serve (voluntary or mandatory), and whether the court attempts to match cases based on the expertise of the arbitrator. These differences are summarized in the Table at the end of this section.

## **A. The Statewide Structure**

### **1. Statutory Authorization**

In A.R.S. §12-133(A), the legislature requires the Superior Court of each county to submit cases below a specified amount in controversy to arbitration. The jurisdictional limit for this court-connected arbitration may not exceed \$50,000. The statute directs the Superior Court to maintain a list of qualified persons within its jurisdiction “who have agreed to serve as arbitrators,” subject to the right of each person on the list to refuse to serve in a particular case, and subject to the parties’ right to strike an arbitrator for good cause.<sup>10</sup> The arbitrator must be paid a “reasonable sum, not to exceed seventy-five dollars” for each hearing day, which must be paid by the county from its general revenues and may not be taxed as costs.<sup>11</sup>

The statute also establishes the right of any party to appeal the arbitration award for a “trial *de novo* on law and fact,”<sup>12</sup> but creates a disincentive for any appeal: if the judgment on the trial is not at least 25% more favorable than the arbitration award, the appealing party must pay the appellee’s costs and fees on appeal, and must reimburse the county for the arbitrator’s fee.<sup>13</sup> Finally, the statute extends immunity to arbitrators for actions taken during arbitration.<sup>14</sup>

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<sup>10</sup> A.R.S. §12-133(C).

<sup>11</sup> A.R.S. §12-133(G).

<sup>12</sup> The right to trial *de novo* is essential to the constitutionality of compulsory arbitration. *Valler v. Lee*, 190 Ariz. 391, 393, 949 P.2d 51, 53 (App. 1997).

<sup>13</sup> A.R.S. §12-133(H) and (I).

<sup>14</sup> A.R.S. §12-133(J).

## **2. The Rules of Procedure Governing Arbitration**

The statewide rules of court governing arbitration are Rules 72 to 76 of the Arizona Rules of Civil Procedure.<sup>15</sup> Through these rules, the Supreme Court has allowed each county, by local rule of court, to set the jurisdictional limit for arbitration in its Superior Court.<sup>16</sup> Cases must be submitted to arbitration if no party seeks affirmative relief other than a money judgment and the amount in controversy is within the jurisdictional limit.<sup>17</sup> Parties are allowed to opt out of compulsory arbitration if they stipulate to participate in a different alternative dispute resolution proceeding approved by the court.<sup>18</sup>

The plaintiff is required to file a certificate with the complaint, advising the court that the case is or is not subject to compulsory arbitration.<sup>19</sup> If the defendant controverts the plaintiff's certificate, the issue of arbitrability is decided by the judge.<sup>20</sup>

Each Superior Court is required to maintain a list of arbitrators "who may be designated as to the area of concentration, specialty or expertise."<sup>21</sup> The court may include on this list all residents of the county who have been active members of the State Bar of Arizona for at least four years, plus other members of the Bar who have agreed to serve as arbitrators in that particular county.<sup>22</sup> The court must randomly select a name

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<sup>15</sup> Prior to the Supreme Court's initiative to consolidate rules in 2000, these rules were contained in separate Uniform Rules of Procedure for Arbitration. *See* Section I, note 1, *supra*.

<sup>16</sup> Ariz. R. Civ. P. 72(a) and (b).

<sup>17</sup> *Id.*

<sup>18</sup> Ariz. R. Civ. P. 72(d). Parties may also opt in to arbitration for any claim, whether or not suit has been filed, by filing an Agreement of Reference pursuant to Ariz. R. Civ. P. 72(c).

<sup>19</sup> Ariz. R. Civ. P. 72(e)(1).

<sup>20</sup> Ariz. R. Civ. P. 72(e)(3).

<sup>21</sup> Ariz. R. Civ. P. 73(c).

<sup>22</sup> Ariz. R. Civ. P. 73(b). This provision of the Rule, which authorizes a Superior Court to require lawyers to serve as arbitrators, appears to be at odds with A.R.S. §12-133(C), which provides that "the court shall maintain a list of qualified persons within its jurisdiction *who have agreed to serve* as arbitrators...." (Emphasis supplied.) The question of whether the Court can require lawyers to serve as arbitrators, in light of this conflict with the statute, is currently being litigated.

from this list to be assigned as arbitrator.<sup>23</sup> Within ten days of being notified of the assigned arbitrator, each party may exercise one peremptory strike. In addition, an arbitrator may be disqualified from serving in a particular case due to an ethical conflict of interest or other good cause, and may be excused from service if the arbitrator has already ruled in two contested arbitration hearings during that calendar year.<sup>24</sup> Once an arbitrator is stricken or excused, a new arbitrator must be randomly selected from the list.<sup>25</sup>

Although arbitrators may use court facilities, upon request, for arbitration hearings, most arbitrations take place in the arbitrator's office. According to the statewide rules, the arbitrator must fix a time for the hearing not less than 60 nor more than 120 days after his or her appointment.<sup>26</sup> The time periods specified by Rule 38.1(d), Ariz. R. Civ. P. (pursuant to which a case is placed on the inactive calendar for dismissal if a motion to set and certificate of readiness is not filed within nine months of its commencement) are not tolled by the assignment of a case to arbitration.<sup>27</sup> The arbitrator may shorten or extend the time periods for the hearing, but may not decide motions to continue on the inactive calendar or otherwise extend the time limits prescribed by Rule 38.1.<sup>28</sup> However, once a case is assigned to arbitration, the arbitrator is empowered to make all other legal rulings in the case.<sup>29</sup>

Ten days before the hearing, counsel are required to submit a joint, written pre-hearing statement to the arbitrator, identifying the nature of the claim and listing each party's witnesses and exhibits.<sup>30</sup> While the Rules of Evidence apply at arbitration hearings, many of the foundational requirements for the admissibility of documentary

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<sup>23</sup> Ariz. R. Civ. P. 73(c).

<sup>24</sup> Ariz. R. Civ. P. 73(e).

<sup>25</sup> *Id.*

<sup>26</sup> Ariz. R. Civ. P. 74(b).

<sup>27</sup> *Martinez v. Binsfield*, 196 Ariz. 466, 999 P.2d 810 (2000).

<sup>28</sup> Ariz. R. Civ. P. 74(a).

<sup>29</sup> *Id.*

<sup>30</sup> Ariz. R. Civ. P. 74(e).

evidence are relaxed.<sup>31</sup> Failure of a party to appear at an arbitration hearing or to participate in good faith constitutes a waiver of the right to appeal absent a showing of good cause.<sup>32</sup>

The arbitrator is required to render a decision within 10 days after the completion of the hearing.<sup>33</sup> Within 10 days of receiving notice of the arbitrator's decision, either party may submit a proposed form of award, including requests for attorneys' fees and costs, and the opposing party has five days to file objections.<sup>34</sup> The arbitrator must file an award and final disposition within 10 days following the time period for objections to the form of award.<sup>35</sup> If the arbitrator does not file an award or final disposition with the Clerk of the Superior Court within 145 days after the first appointment of an arbitrator, the case is to be referred to the judge "for appropriate action."<sup>36</sup>

Any party may appeal the arbitrator's decision for a trial *de novo* in Superior Court by filing an "Appeal from Arbitration and Motion to Set for Trial" within 20 days after the filing of the arbitration award.<sup>37</sup> With the appeal, the party must deposit a sum equal to one hearing day's compensation of the arbitrator.<sup>38</sup> As prescribed by the statute, if the judgment on the trial *de novo* is not at least 25% more favorable than the arbitration award, the appellant may be required to reimburse any compensation actually paid by the county to the arbitrator, and may be required to pay the costs, reasonable attorneys' fees and expert witness fees incurred by the appellee in connection with the appeal.<sup>39</sup> If no appeal is taken, the arbitrator's award becomes binding as a decision of the Superior Court.<sup>40</sup>

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<sup>31</sup> Ariz. R. Civ. P. 74(f) and (g).

<sup>32</sup> Ariz. R. Civ. P. 74(k).

<sup>33</sup> Ariz. R. Civ. P. 75(a).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Ariz. R. Civ. P. 75(b).

<sup>37</sup> Ariz. R. Civ. P. 76(a).

<sup>38</sup> Ariz. R. Civ. P. 76(b).

<sup>39</sup> Ariz. R. Civ. P. 76(f).

<sup>40</sup> Ariz. R. Civ. P. 75(c).



## **B. Differences in Program Structure Among the Counties**

### **1. Maricopa County**<sup>41</sup>

In Maricopa County, all cases involving \$50,000 or less in controversy are subject to arbitration.<sup>42</sup> This determination is based on information contained in the certificate on compulsory arbitration, which must be filed by the plaintiff with the complaint.<sup>43</sup> If the defendant agrees that the amount in controversy is less than \$50,000, the case is assigned to arbitration by court staff after the answer is received.<sup>44</sup> Cases in which a motion to dismiss is filed with the answer are not assigned to arbitration until after the motion is decided. If the parties do not agree on arbitrability, the issue is referred to a judge for decision.

Once a case is assigned to arbitration, court staff appoint an attorney to serve as the arbitrator. In appointing arbitrators, the court uses a computer database listing all attorneys in the county with 4 or more years experience, appointing the attorneys randomly with no attempt to match the arbitrator's expertise with the subject matter of the case.<sup>45</sup> Certain public attorneys, such as prosecutors and public defenders, are not required to serve. All other attorneys who have been active members of the State Bar for four or more years are required to serve in up to 2 cases per year.

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<sup>41</sup> The information contained in this section is derived from the local rules of practice for Maricopa County as well as interviews with court staff. We would like to thank the following judges and staff of the Superior Court of Arizona in Maricopa County for their assistance in providing information concerning the arbitration program in their county: Gloria Braskett, Administrative Coordinator of the Arbitration Program, Marcus Reinkensmeyer, Court Administrator, Hon. Colin Campbell, Presiding Judge, and Hon. Michael A. Yarnell, Judge.

<sup>42</sup> Rule 3.10, Local Rules of Practice for the Superior Court in Maricopa County.

<sup>43</sup> *Id.*

<sup>44</sup> Prior policy permitted court staff to assign tort motor vehicle cases to arbitration 60 days after the complaint was filed, regardless of whether the defendant answered the complaint within that time. That practice was recently discontinued.

<sup>45</sup> According to the Presiding Judge for Maricopa County, one of the reasons arbitrators are not assigned to cases based on their expertise or area of practice in Maricopa County is a concern that subject-matter matching might increase the number of recusals, disqualifications and strikes, based on the arbitrator's prior dealings with the attorneys involved in the case. Another reason is the logistical difficulties, given the volume of cases.

The court sends the parties notice of the appointment of the arbitrator, and each party has the right to one peremptory strike. The parties may also move to disqualify the arbitrator for cause, or the arbitrator may seek to be excused from service for conflict of interest or other good cause. Arbitrators typically will not be excused for reasons other than good cause, and the court has fined lawyers who refused to serve. If the arbitrator is stricken or excused for good cause, the court uses the same computer program to randomly assign a new arbitrator. The court sends the arbitrator a packet of material, including forms and instructions for conducting the arbitration.<sup>46</sup> The case file is retained by the court unless and until the arbitrator picks it up.

Arbitrators are responsible for scheduling the hearing and are instructed that the hearing must commence no less than 60 nor more than 120 days after their appointment, pursuant to Rule 74(b), Ariz. R. Civ. P. After a case has been assigned to arbitration, the court does not systematically monitor the progression of the case. While arbitrators rule on requests to continue a scheduled hearing, only a judge may decide a motion to continue the case on the inactive calendar.

Once the hearing is concluded, the arbitrator may seek compensation by completing and submitting a 2-page form to the County. The form allows the arbitrator to simply assign the compensation to a State Bar fund that supports public service programs.<sup>47</sup> Maricopa County paid approximately \$40,000 in arbitrator compensation in 2003.<sup>48</sup>

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<sup>46</sup> A copy of the packet for arbitrators is included in Appendix A.

<sup>47</sup> See Appendix A.

<sup>48</sup> In addition to the amount expended for arbitrator compensation, the court must pay for the staff needed to administer the arbitration program. Two full time court administrators assign cases to arbitration; an unknown amount of staff time in the Clerk of the Court's office is needed to process arbitration cases and provide the files to the arbitrators; and a staff person must spend an unspecified amount of time maintaining and updating the list of arbitrators.

## **2. Pima County**<sup>49</sup>

The jurisdictional limit for arbitration in Pima County is also \$50,000.<sup>50</sup> Although the plaintiff is required to file a certificate on compulsory arbitration with the complaint, as required by Ariz. R. Civ. P. 72(e)(1), the court does not use this certificate to decide arbitrability. This issue is not addressed, and cases are not assigned to arbitration until after a party has filed a motion to set and certificate of readiness for trial, which can be up to nine months after the commencement of the case.<sup>51</sup> The party filing a certificate of readiness must indicate on the form whether the case is subject to compulsory arbitration. The opposing party may controvert the certificate, in which case the question of arbitrability is decided by the judge.

The court assigns arbitrators from a database of attorneys it maintains. Lawyers are placed on this list if they have been members of the bar in Pima County for four or more years and they have appeared as counsel in a civil case in Superior Court. In addition, the judge assigned to oversee ADR in Pima County actively solicits other attorneys to add their names to this database. Government lawyers, domestic relations practitioners and criminal defense attorneys are typically not included on the list. Although a lawyer may have his or her name removed from the list upon request, the court discourages attorneys from refusing to continue to “volunteer.” The database includes information about the lawyers’ areas of practice, and arbitrators are randomly assigned to cases within their practice area. When lawyers who have not practiced in one of the specified areas are added to the database, they are assigned to tort motor vehicle cases on the assumption that subject-matter expertise is not as important in arbitrating these cases.

The court sends the parties notice of the appointment of the arbitrator, and each party has the right to one peremptory strike. The parties may also move to disqualify the arbitrator for cause, or the arbitrator may seek to be excused from service for conflict of interest or other good cause.

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<sup>49</sup> The information contained in this section is derived from the local rules of practice as well as interviews with court staff. We would like to especially thank Hon. Carmine Cornelio, Judge; Andy Dowdle, Manager of the Research and Statistics Division; and Sue Wachter, Manager of Calendar Services, for their assistance in providing information concerning the arbitration program in Pima County.

<sup>50</sup> Rule 3.9, Local Rules of Practice for the Superior Court in Pima County.

<sup>51</sup> In Pima County, parties are not required to certify that discovery is near completion when they file their motion to set. However, as in Maricopa County, cases are placed on the inactive calendar to be dismissed for failure to prosecute if a motion to set is not filed within 9 months of the commencement of the case. R. 5.13, Local Rules of Practice for the Superior Court in Pima County.

As prescribed by Rule 74(b), Ariz. R. Civ. P., the arbitrator is expected to set the hearing between 60 and 120 days following his or her appointment. If the case is still pending in arbitration 90 days after the arbitrator's appointment, the court sends the arbitrator a request to submit a status report. Unlike Maricopa County, arbitrators are instructed that motions to continue must be decided by the judge. Most Pima County arbitrators seek payment for their services, and the county spends approximately \$20,000 per year in arbitrator compensation.

### **3. The Other Counties**<sup>52</sup>

Ten of the thirteen remaining counties in Arizona have arbitration programs, with jurisdictional limits ranging from \$25,000 to \$50,000.<sup>53</sup> (*See* the table on the following page.) Half of the counties assign cases to arbitration at the outset of the litigation, based on the certificates on compulsory arbitration filed with the pleadings. In Coconino County, the judge conducts a case management conference within 60 days after the answer, and ADR is routinely discussed at this conference. If the case is below the jurisdictional limit of \$50,000 and the parties have not agreed on another form of ADR, the judge assigns the case to arbitration at that time. In Yavapai County, the ADR coordinator assigns cases to arbitration based on information contained in the Joint ADR Statements, which are supposed to be filed 120 days after the complaint is answered.<sup>54</sup> The remaining three counties assign cases to arbitration based on information provided with the motion to set and certificate of readiness.

Six counties, in addition to Maricopa and Pima, require attorneys practicing within their borders to serve as arbitrators; the remaining four counties maintain lists of attorneys who have agreed to serve as arbitrators. Only three counties other than Pima attempt to match cases to the arbitrator's area of practice. None of the counties require or provide training for their arbitrators.

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<sup>52</sup> Information for this section was obtained from the local rules of practice and from court personnel throughout the state. Court administrators in each county received a questionnaire seeking information about the arbitration programs in their courts. In addition, telephonic interviews were conducted with administrators from several courts. We would like to thank the numerous court administrators and ADR coordinators who took time out of their busy calendars to research and answer our many questions.

<sup>53</sup> Greenlee and Santa Cruz Counties reported having no arbitration program. Apache County has a local rule setting the jurisdictional limit for arbitration at \$10,000, however, we could not confirm whether any cases in Apache County were being referred to arbitration.

<sup>54</sup> Ariz. R. Civ. P. 16(g)(2).

<b>Arbitration Program Structure, By County</b>				
County	Jurisdictional Limit <sup>55</sup>	When Case Is Assigned to Arbitration	Attorney Service as Arbitrators	Match Arbitrator Expertise with Subject of Case
Apache	\$10,000	information not available	- -	- -
Cochise	\$50,000	after Motion to Set	voluntary	no
Coconino	\$50,000	during early case management conference	voluntary	no
Gila	\$25,000	after Motion to Set	mandatory	no <sup>56</sup>
Graham	\$30,000	after pleadings	mandatory	no
Greenlee	no program	- -	- -	- -
La Paz	\$25,000	after pleadings	mandatory	no
Maricopa	\$50,000	after pleadings	mandatory	no
Mohave	\$25,000	after pleadings	mandatory	yes
Navajo	\$25,000	after Motion to Set	voluntary	no
Pima	\$50,000	after Motion to Set	voluntary <sup>57</sup>	yes
Pinal	\$40,000	after pleadings	voluntary	yes
Santa Cruz	no program	- -	- -	- -
Yavapai	\$25,000	after Joint ADR Statement is received	mandatory <sup>58</sup>	yes
Yuma	\$30,000	after pleadings	mandatory	no

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<sup>55</sup> Both Greenlee and Santa Cruz Counties have set the jurisdictional limit for arbitration at \$1,000. Because cases under \$1,000 are not filed in the Superior Court, these counties do not have arbitration programs. Graham County's arbitration program was newly implemented for 2004.

<sup>56</sup> Rule 13 of the Local Rules of Practice of the Superior Court in Gila County specifies that assignment of arbitrators shall be within the expressed areas of expertise of the attorneys, to the extent possible. However, court administration indicated that arbitrators are not matched to cases according to subject-matter expertise.

<sup>57</sup> Lawyers in Pima County may have their names removed from the list upon request, however, many Pima County lawyers appear to be under the impression that service is mandatory.

<sup>58</sup> In Yavapai County, although all attorneys are on the "list," two volunteers handle most arbitrations.

### III. The Performance of Court-Connected Arbitration in the Superior Courts of Arizona

In this section of the report, we examine the performance of the arbitration program in each of the counties. First, however, we need to clarify some terminology. Cases “subject to arbitration” are those the plaintiff certifies are subject to compulsory arbitration in the certificate on compulsory arbitration filed with the complaint. At a later point,<sup>1</sup> cases subject to arbitration that are still active are “assigned to arbitration.” An arbitrator is appointed only after the case is assigned to arbitration. Importantly, the courts typically collect and report statistics on “arbitration cases” only after cases have been assigned to arbitration; cases subject to arbitration that conclude before assignment generally are not tracked as part of the arbitration caseload but instead as part of the non-arbitration caseload.<sup>2</sup>

For each of the counties, we report the number of cases assigned to arbitration, the percentage of the civil caseload that cases assigned to arbitration represent, the number of arbitration awards filed, the number of requests for trial de novo filed, and the number of arbitration appeals that result in trials.

For Maricopa and Pima Counties, we examine the performance of the arbitration program in more detail.<sup>3</sup> First, we examine the composition, disposition, and time to disposition of a sample of cases that were *subject* to arbitration but that concluded prior to assignment to arbitration. Second, we compare the length of time from the complaint to final disposition for a sample of cases *subject* to arbitration with a sample of cases *not subject* to arbitration. Next, we report the composition and disposition of all cases *assigned* to arbitration. Finally, we follow the progression of a sample of cases *assigned* to arbitration through the arbitration process. We report the time involved in arbitrator appointment and re-appointment as well as whether the time frames prescribed by the Compulsory Arbitration Rules for scheduling the hearing and for filing the award are

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<sup>1</sup> See *supra* Table 1, Section II.B.

<sup>2</sup> This issue is discussed in more detail, *infra*. The courts report monthly to the Administrative Office of the Courts the number of “cases filed for arbitration,” defined as the “number of cases assigned to arbitration during the month.” See Arizona Supreme Court Administrative Office of the Courts, Research/Statistics Unit, *Instructions for Completing the Superior Court Monthly Statistical Report*, 5 (June 1996).

<sup>3</sup> Given differences between Maricopa and Pima County in the availability and accessibility of information from the courts’ computerized databases, some of these issues were addressed in different ways in the two counties or were not addressed in both counties.

being met. In addition, we examine how and when cases assigned to arbitration are concluded and whether there are differences among case types in the type of disposition or the time between arbitration events.

Subsection A describes the performance of the arbitration program in Maricopa County; Subsection B reports similar information for Pima County. Subsection C focuses on the performance of the arbitration program in the thirteen other counties. In Subsection D, we summarize the information in the prior subsections and make comparisons across the counties.



## **A. Court-Connected Arbitration in the Superior Court of Arizona in Maricopa County**

In Maricopa County, the court designates cases as “subject to arbitration” at the time the complaint is filed. This designation is based on the certificate on compulsory arbitration that accompanies the complaint. After the answer is filed, cases are designated as “assigned to arbitration,” and subsequently the arbitrator is appointed.<sup>4</sup> Thus, cases “subject” to arbitration in which there is no service, no answer filed, a judicial determination that the case is not eligible for arbitration, or a settlement or dismissal prior to the answer being filed, are not “assigned” to arbitration.

The distinction between being “subject to” and being “assigned to” arbitration has implications for how case disposition information is recorded in the court’s computer database and, thus, for what information is available for which cases. The court uses arbitration-specific termination codes for cases *assigned* to arbitration. Thus, those cases can be readily identified in the court database by their termination codes. Cases *subject* to arbitration that terminate prior to assignment to arbitration, however, are given the same termination codes as cases *not subject* to arbitration. For example, cases under \$50,000 that settle before assignment to arbitration are given the same disposition codes as cases over \$50,000 that settle. As a result, there is no way to distinguish in the court’s computerized database, based on disposition codes, cases *subject* to arbitration that concluded before assignment to arbitration from cases *not subject* to arbitration.

In addition, only limited timing information can be generated from the database, such as when the complaint was filed and when the case terminated. The database cannot provide information about when intermediate case processing events occurred, such as when the answer was filed, the arbitrator was appointed, or the hearing was held.<sup>5</sup>

Thus, in order to more fully examine the performance of court-connected arbitration in Maricopa County, we had to supplement information available from the court’s computerized database with information from different samples of cases to address different questions. Accordingly, the findings contained in different parts of this

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<sup>4</sup> See *supra* Section II.B.1.

<sup>5</sup> Subsequent to the collection of data for this report, changes were made in the configuration and structure of the court’s civil database that now enable information to be obtained from the database that was not previously accessible. The authors thank John Reynolds, Judicial Services Administrator and Senior Court Statistician, Gloria Braskett, Administrative Coordinator V, Civil Court Administration, and Diana Clarke, Court Administrator Probate and Mental Health, of the Arizona Superior Court in Maricopa County, for providing data, information, and assistance.

subsection of the report refer to different subsets of cases and are based on different sources of information, each described in more detail in their respective parts below.

The first part of this subsection describes the composition and type of disposition of a sample of cases that were *subject* to arbitration and concluded prior to assignment to arbitration. The second part compares the length of time from complaint to final disposition for a sample of cases *subject* to arbitration with a sample of cases *not subject* to arbitration. The third part describes the composition and disposition of all cases *assigned* to arbitration that concluded in 2003. The fourth part examines in detail the progression through arbitration of a sample of cases *assigned* to arbitration.

## **1. The Composition and Disposition of Cases Subject to Arbitration**

As noted earlier, the court does not track the disposition of cases that the plaintiff certifies as “subject to arbitration” but that conclude prior to assignment to arbitration. The court does report, however, the number of cases *filed* each month that are certified by the plaintiff to be “subject to arbitration.”

In the 2003 fiscal year, 15,173 filed civil cases were certified as being subject to arbitration. Thus, cases *subject* to arbitration represented 42% of all civil cases filed during fiscal year 2003.<sup>6</sup> However, some types of civil cases either are not or are unlikely to be subject to arbitration.<sup>7</sup> When considering only the types of cases that are most likely to be subject to arbitration, namely contracts and torts other than medical malpractice, 81% were under the arbitration jurisdictional limit.<sup>8</sup>

If we subtract from the number of filed cases that were *subject* to arbitration (15,173) the number of cases that were *assigned* to arbitration (4,920 cases),<sup>9</sup> it would appear that approximately 10,253 cases (68%) that were subject to arbitration terminated prior to assignment to arbitration.<sup>10</sup> These findings raise questions about how and when this large proportion of cases subject to arbitration terminate before formally entering the arbitration process.

To be able to examine the disposition of these cases *subject* to arbitration, we had to be able to identify and distinguish them from cases *not subject* to arbitration. This could not be done using the court’s existing computerized database. To obtain this

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<sup>6</sup> See FY2003 Data Report, Superior Court Case Activity, Maricopa County, Arizona Supreme Court, Court Programs Unit, Research and Statistics, available online at <http://www.supreme.state.az.us/stats>.

<sup>7</sup> Appeals from municipal or justice courts are not subject to compulsory arbitration, and most tax, eminent domain, and non-classified cases (*e.g.*, petitions for name change, domestication of foreign judgment, forfeiture, forcible detainer, quiet title) generally would not be subject to arbitration because they are likely to seek affirmative relief for other than a money judgment. *See* Ariz. R. Civ. P. 72(b). Most medical malpractice cases are likely to be above the arbitration jurisdictional limit.

<sup>8</sup> *See* FY2003 Data Report, *supra* note 6.

<sup>9</sup> *See infra* Section III.A.3.

<sup>10</sup> These figures are an approximation because the number of cases *subject* to arbitration was based on fiscal year 2003 case filing data while the number of cases *assigned* to arbitration was based on calendar year 2003 case termination data. An examination of pending cases designated as *subject* to arbitration found a similar distribution between cases that had been (36%) and had not been (64%) assigned to arbitration.

information for all cases would have been prohibitive. Instead, we selected a random sample of 1,863 tort motor vehicle, tort non-motor vehicle, and contract cases that terminated in 2003 from a database the court provided.<sup>11</sup> We included only this subset of case types in the sample because the other case types typically would not be subject to arbitration.<sup>12</sup>

The database the court provided contained the case number, case type, filing and disposition dates, and type of disposition, but did not indicate whether the case was subject to arbitration. To obtain this information, we examined the public access docket information for each case in the sample to see whether the case had been designated by the court as “subject to arbitration” or “not subject to arbitration” based on the certificate on compulsory arbitration the plaintiff filed with the complaint.<sup>13</sup>

In the sample of tort and contract cases examined, 1,145 cases were designated as subject to arbitration. Among these cases, 61% were not assigned to arbitration and 39% were assigned to arbitration. This is similar to the proportions seen in all filed cases, *supra*.

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<sup>11</sup> This sample comprised approximately 10% of these three case types. The database we used did not include cases with the following dispositions: branch transfer, name change, forcible detainer, forfeiture, and miscellaneous order (includes quiet title, replevin, and provisional remedy). These dispositions were excluded because they typically involve cases that seek affirmative relief for other than a money judgment and, thus, would not be subject to arbitration. *See* Ariz. R. Civ. P. 72(b). None of these cases were *assigned* to arbitration.

<sup>12</sup> *See supra* note 7 and accompanying text. Other case types comprised only 4% of cases *assigned* to arbitration. *See supra* Section III.A.3.

<sup>13</sup> The authors thank Katherine Winder and Anne Hardwick for their assistance in compiling this information.

As shown in the following table, the composition of cases assigned to arbitration differed from those of cases not assigned to arbitration.<sup>14</sup> Tort motor vehicle cases comprised the majority of cases assigned to arbitration, while contract cases comprised the majority of cases that were not assigned to arbitration. Tort non-motor vehicle cases were twice as likely to be assigned to arbitration as to not be assigned to arbitration.

<b>Composition of Cases Subject to Arbitration, By Assignment to Arbitration (Based on a Sample of Tort and Contract Cases)</b>		
Case Type	Not Assigned to Arbitration ( <i>n</i> = 697)	Assigned to Arbitration ( <i>n</i> = 448)
Tort motor vehicle	26%	52%
Tort non-motor vehicle	5%	12%
Contract	69%	36%

Looking at the relationship of case type and assignment to arbitration in another way, only one-fourth of contract cases subject to arbitration were assigned to arbitration. By contrast, a majority of tort motor vehicle (57%) and tort non-motor vehicle cases (61%) subject to arbitration were assigned to arbitration.

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<sup>14</sup>  $\chi^2(2) = 126.51, p < .001$ . To determine whether apparent differences between groups of cases (here, the counties) were “true” differences (*i.e.*, statistically significant differences) or merely reflected chance variation, tests of statistical significance were conducted. The conventional level of probability for determining the statistical significance of findings is the .05 level (*i.e.*,  $p < .05$ ). RICHARD P. RUNYON & AUDREY HABER, FUNDAMENTALS OF BEHAVIORAL STATISTICS at 229-31 (5<sup>th</sup> ed. 1984).

As seen in the following table, a majority of cases in the sample that were subject but not assigned to arbitration terminated as a result of default (primarily because an answer was not filed) (36%) or as a result of lack of service or lack of prosecution (28%), with 29% resolved by settlement. In contrast, a majority of tort and contract cases assigned to arbitration were resolved by settlement (55%) or by the arbitration award (31%).

<b>Final Disposition of Cases Subject to Arbitration, By Assignment to Arbitration (Based on a Sample of Tort and Contract Cases)</b>		
<b>Final Disposition Type</b>	<b>Not Assigned to Arbitration (<i>n</i> = 697)</b>	<b>Assigned to Arbitration (<i>n</i> = 448)</b>
Dismissed for lack of service	9%	n/a
Change venue, removed, remanded	< 1%	0%
Default judgment	36%	2%
Dismissed for lack of prosecution	19%	9%
Settled	29%	55%
Judgment or order	5%	n/a
Summary judgment	1%	0%
Arbitration award	n/a	31%
Trial judgment	< 1%	3%

For cases assigned to arbitration, there were no differences among the three case types in the likelihood that cases settled before an award was filed versus were resolved after the award was filed.<sup>15</sup> Nor were there differences among case types in whether or not the award was appealed.<sup>16</sup>

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<sup>15</sup>  $\chi^2(2) = 2.96, p = .228$ .

<sup>16</sup>  $\chi^2(2) = 4.96, p = .084$ .

Given these differences in the type of disposition, not surprisingly, cases subject but not assigned to arbitration had a shorter time from filing the complaint to final disposition, by almost five months, than did cases assigned to arbitration (means of 243 days and 387 days, respectively).<sup>17</sup> Half of the cases subject but not assigned to arbitration concluded within 188 days of the complaint, while it took four months longer for half of the cases assigned to arbitration to conclude (311 days). Ninety percent of the cases subject but not assigned to arbitration concluded within 454 days of the complaint, while it took almost seven months longer for the same proportion of cases assigned to arbitration to conclude (659 days).

<b>Days from Complaint to Final Disposition, By Whether Case Was Assigned to Arbitration (Based on a Sample of Tort and Contract Cases)</b>		
Percentage of Cases Concluded	Not Assigned to Arbitration ( <i>n</i> = 697)	Assigned to Arbitration ( <i>n</i> = 448)
25%	115 days	227 days
50% (median)	188 days	311 days
75%	373 days	497 days
90%	454 days	659 days

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<sup>17</sup>  $F(1, 1143) = 126.62, p < .001$ .

## **2. Time from Complaint to Disposition: A Comparison of Cases Subject to Arbitration and Cases Not Subject to Arbitration**

To be able to compare the time to disposition for cases *subject* to arbitration with cases *not subject* to arbitration, we had to be able to identify these two sets of cases. As noted above, because this could not be done using the court's existing computerized database, the time to disposition comparisons were conducted on a sample of cases.

### **a. Case Sample**

We ascertained the arbitration status of a random sample of 1,863 tort motor vehicle, tort non-motor vehicle, and contract cases that terminated in 2003.<sup>18</sup> This sample of cases was already limited to case and disposition types that were likely to be subject to arbitration. This helped make the cases subject to arbitration and the cases not subject to arbitration more comparable so that examining the time to disposition for these two sets of cases would be more meaningful.<sup>19</sup>

This sample of tort and contract cases consisted of 1,145 cases subject to arbitration, 657 cases not subject to arbitration, and 61 cases for which the arbitration status could not be determined from information in the case docket. The latter group of cases was not included in the time to disposition analyses.

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<sup>18</sup> See *supra* Section III.A.1.

<sup>19</sup> For instance, we would not want to include non-classified civil cases in these comparisons, because they comprised a sizeable proportion (45%) of all civil cases but typically would not be subject to arbitration, and in fact comprised less than 4% of cases assigned to arbitration. See *infra* Section III.A.3 and Section III.C. Excluding “nonlitigious” case types (primarily non-classified cases) for the purpose of calculating the time to disposition is consistent with the National Center for State Courts’ Trial Court Performance Standards and Measurement System, Measure 2.1.1 (available online at [http://www.ncsconline.org/D\\_Research/TCPS/](http://www.ncsconline.org/D_Research/TCPS/)).



As shown in the following table, contract claims comprised the majority of both cases subject to and not subject to arbitration. Cases subject to arbitration were more likely than cases not subject to arbitration to involve tort motor vehicle claims and were less likely to involve tort non-motor vehicle claims.<sup>20</sup>

<b>Composition of Cases, By Whether Cases Were Subject to Arbitration (Based on a Sample of Tort and Contract Cases)</b>		
Case Type	Subject to Arbitration ( <i>n</i> = 1145)	Not Subject to Arbitration ( <i>n</i> = 657)
Tort motor vehicle	36%	23%
Tort non-motor vehicle	8%	23%
Contract	56%	54%

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<sup>20</sup>  $\chi^2(2) = 99.10, p < .001$ .

Tort and contract cases subject to arbitration were less likely to be resolved by settlement (39%) than were cases not subject to arbitration (55%), but were more likely to conclude as a result of a default (23% vs. 9%). Three percent of cases subject to arbitration were resolved by summary judgment or some other non-trial judgment or order, compared to 8% of cases not subject to arbitration. The trial rate was similar (1%) regardless of whether cases were or were not subject to arbitration. These findings suggest that arbitration diverted cases from settlement, not trial, and might have diverted some cases from other types of judgments.

<b>Final Disposition of Cases, By Whether Cases Were Subject to Arbitration (Based on a Sample of Tort and Contract Cases)</b>		
Disposition Type	Subject to Arbitration ( <i>n</i> = 1145)	Not Subject to Arbitration ( <i>n</i> = 657)
Dismissed for lack of service	5%	5%
Change venue, removed, remanded	< 1%	5%
Default judgment	23%	9%
Dismissed for lack of prosecution	15%	17%
Settled	39%	55%
Judgment or order	3%	6%
Summary judgment	< 1%	2%
Arbitration award	12%	n/a
Trial judgment	1%	1%

## **b. Time from Complaint to Final Disposition**

As seen above, the subsets of cases subject to arbitration and not subject to arbitration in this sample differed in terms of case composition and disposition as well as the amount in controversy.<sup>21</sup> Accordingly, any observed differences between these two groups of cases in the time to disposition could be due to these factors rather than to something about the arbitration process.

The previously observed differences in the time to disposition for cases assigned to arbitration versus cases subject but not assigned to arbitration<sup>22</sup> have implications for how we compare the time to disposition for cases subject to arbitration versus not subject to arbitration. Comparing cases *assigned* to arbitration with cases *not subject* to arbitration would produce misleading results because the former group, by definition, does not include certain dispositions that tend to terminate early (*e.g.*, cases with no service or no answer) that are part of the latter group. On the other hand, comparing all cases subject to arbitration with all cases not subject to arbitration might produce less meaningful results about the impact of arbitration on the time to disposition because it would include non-contested cases subject but not assigned to arbitration, cases for which the arbitration process presumably had little or no effect on the time to disposition.

Accordingly, we conducted two sets of time to disposition analyses, each using a different group of cases. The first set of analyses included all dispositions in the sample of tort and contract cases and compared cases subject to arbitration (39% assigned and 61% not assigned to arbitration) with cases not subject to arbitration.<sup>23</sup> The second set of analyses used a subset of disposition types that involved only contested cases with more clear final disposition dates and again compared cases subject to arbitration (62% assigned and 38% not assigned to arbitration) with cases not subject to arbitration.<sup>24</sup> The two sets of analyses produced generally similar results.

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<sup>21</sup> Because the amount in controversy was not routinely recorded in the case docket files, we were unable to make the cases more comparable by excluding cases not subject to arbitration in which the claim amount was well above the arbitration jurisdictional limit.

<sup>22</sup> *See supra* Section III.A.1.

<sup>23</sup> *See supra* notes 7 and 11 for excluded case and disposition types.

<sup>24</sup> The second set of analyses is more comparable to those conducted for Pima County cases. *See infra* Section III.B.1.

First, examining the full set of dispositions in the sample, the average time from filing the complaint to final disposition was shorter by just over three months for cases subject to arbitration than for cases not subject to arbitration (means of 299 vs. 395 days, respectively).<sup>25</sup>

<b>Days from Complaint to Final Disposition, By Whether Case Was Subject to Arbitration (Based on a Sample of Tort and Contract Cases)</b>		
Percentage of Cases Concluded	Cases Subject to Arbitration ( <i>n</i> = 1145)	Cases Not Subject to Arbitration ( <i>n</i> = 657)
25%	149 days	172 days
50% (median)	246 days	352 days
75%	392 days	542 days
90%	543 days	777 days

As seen in the following table, more cases subject to arbitration than not subject to arbitration were concluded within each of the first three time intervals. Conversely, more cases not subject to arbitration were concluded within each of the last three time intervals. Over two-thirds of the cases subject to arbitration, compared to just over half of the cases not subject to arbitration, were concluded within one year of the complaint.

<b>Cumulative Percentage of Cases Concluded, By Whether Case Was Subject to Arbitration (Based on a Sample of Tort and Contract Cases)</b>				
Number of Days from Complaint to Final Disposition	Cases Subject to Arbitration ( <i>n</i> = 1,145)		Cases Not Subject to Arbitration ( <i>n</i> = 657)	
	Percentage of Cases	Cumulative %	Percentage of Cases	Cumulative %
180 or fewer days	35%	35%	28%	28%
181 - 270 days	21%	56%	12%	40%
271 - 365 days	13%	69%	12%	52%
366 - 548 days	21%	90%	24%	76%
549 - 730 days	6%	96%	13%	89%
more than 730 days	4%	100%	11%	100%

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<sup>25</sup>  $F(1, 1800) = 59.90, p < .001$ . A similar pattern was seen for only cases that settled (means of 295 and 409 days ( $F(1, 810) = 33.75, p < .001$ ). See *infra* Section III.A.3.h for differences in the length of time to disposition for cases *assigned* to arbitration that concluded at different points within the arbitration process.

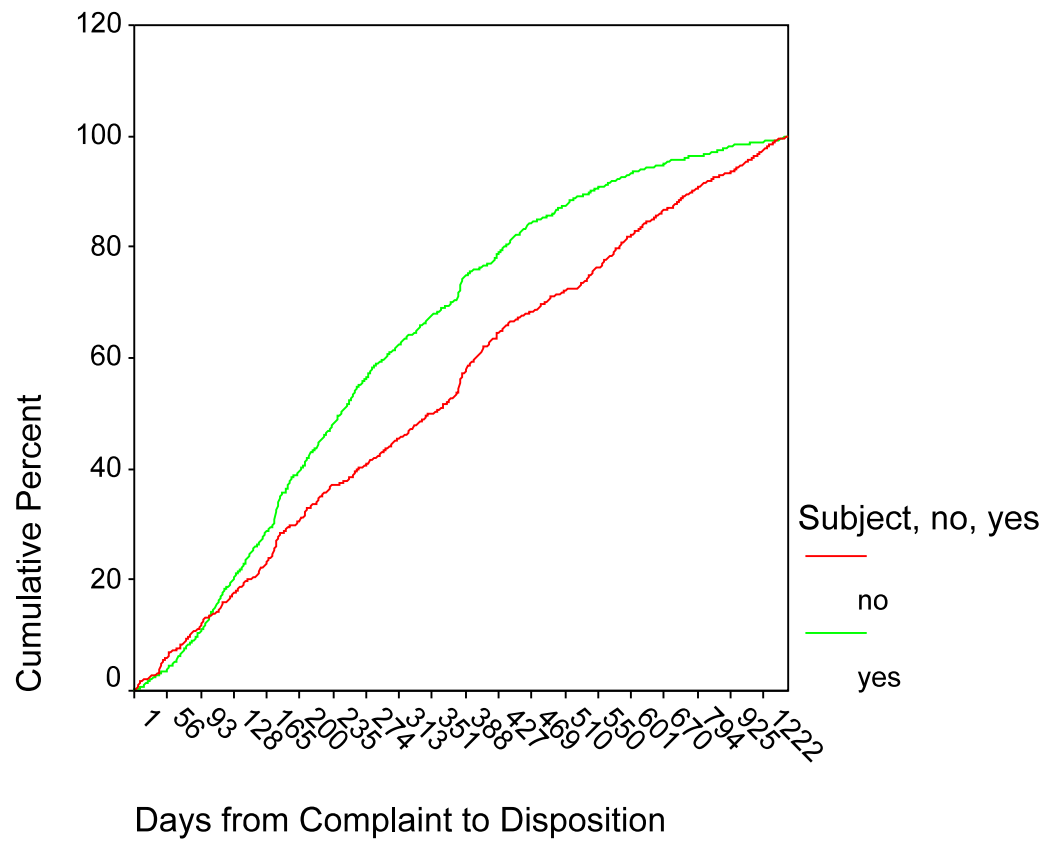
Regardless of whether cases were or were not subject to arbitration, tort and contract cases did not meet the case processing time standards set by the Arizona Supreme Court.<sup>26</sup> As seen in the prior table, this was especially true for the earliest guideline, as only 56% of cases subject to arbitration and 40% of cases not subject to arbitration were resolved within nine months after the complaint was filed, compared to the 90% specified in the standard.<sup>27</sup> Ninety percent of cases subject to arbitration and 76% of cases not subject to arbitration were concluded within 18 months (548 days), compared to the 95% specified in the standard. And 96% of cases subject to arbitration and 89% of cases not subject to arbitration were concluded within two years (730 days), compared to the 99% specified in the standard.

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<sup>26</sup> The time to disposition reported here likely is longer than if non-classified civil cases, which tend to conclude more quickly, had been included. For an explanation for the exclusion of those cases, *see supra* note 19 and accompanying text.

<sup>27</sup> The Arizona Supreme Court adopted the following voluntary case processing time standards for general civil cases in 1989: 90% of cases are to be concluded within 9 months of filing, 95% within 18 months, and 99% within 24 months. *See* Heather Dodge & Kenneth Pankey, Case Processing Time Standards in State Courts, 2002-03, Appendix B, available online at [http://www.ncsconline.org/wc/Publications/KIS\\_CasManCPTSPub.pdf](http://www.ncsconline.org/wc/Publications/KIS_CasManCPTSPub.pdf). According to the guidelines of the Conference of State Court Administrators, cases in court-connected arbitration should be held accountable to the same standards of timeliness as cases in litigation. *See* Roger Hanson et al., Court-Annexed Arbitration: Lessons from the Field, *State Court J.*, 4, 8 (1991).

The following graph further illustrates differences in the time to disposition for cases subject and not subject to arbitration.



We cannot assume, however, that the fact that cases subject to arbitration were resolved more quickly than cases not subject to arbitration was related to the arbitration process rather than to differences in the amount in controversy.<sup>28</sup> For instance, because cases subject to arbitration involve smaller claims, they are likely to be less complex and involve less discovery; therefore, they might tend to resolve earlier regardless of the arbitration program.

In addition, because the composition of cases subject versus not subject to arbitration differed, differences between these two sets of cases in the time to disposition could reflect the effect of case composition rather than the effect of the arbitration program. To explore the possible role of case composition in the time to disposition findings, we examined time to disposition separately for each type of case. Each case type tended to be resolved more quickly when subject to arbitration than when not subject to arbitration, although the comparison for tort non-motor vehicle cases approached but did not reach statistical significance.<sup>29</sup> These findings suggest that differences in the time to disposition between cases subject and not subject to arbitration do not solely reflect the mix of cases in the two groups.<sup>30</sup>

<b>Days from Complaint to Final Disposition, By Case Type &amp; Whether Case Was Subject to Arb. (Based on a Sample of Tort and Contract Cases)</b>						
Case Type	Cases Subject to Arbitration ( <i>n</i> = 1145)			Cases Not Subject to Arbitration ( <i>n</i> = 657)		
	mean	median	90 <sup>th</sup> percentile	mean	median	90 <sup>th</sup> percentile
Tort motor vehicle	315	268	566	444	391	866
Tort non-motor vehicle	368	267	789	442	386	864
Contract	280	223	504	353	304	647

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<sup>28</sup> In fact, information available in Pima County suggested that the faster resolution of cases subject to arbitration could very well reflect differences associated with the size of the claim rather than the impact of arbitration program deadlines. *See infra* Section III.B.1.

<sup>29</sup> Tort motor vehicle:  $F(1, 561) = 29.06, p < .001$ ; Contract:  $F(1, 994) = 22.37, p < .001$ ; Tort non-motor vehicle:  $F(1, 241) = 3.27, p = .072$ .

<sup>30</sup> Among cases subject to arbitration, contract cases were resolved faster than tort motor vehicle cases, which in turn were resolved more quickly than tort non-motor vehicle cases ( $F(2, 1142) = 7.80, p < .001$ ). Among cases not subject to arbitration, contract cases were resolved more quickly than both types of tort cases ( $F(2, 654) = 7.67, p < .01$ ).

We conducted a second set of time to disposition comparisons using a subset of disposition types that involved only contested cases with more clear final disposition dates.<sup>31</sup> From the sample of cases used in the prior analyses, we excluded types of dispositions that were not likely to involve actively contested lawsuits (*e.g.*, lack of service, default judgment), for which the “disposition” was not “final” (*e.g.*, transferred to another court, otherwise removed), and for which the final disposition date was likely to be considerably later than the actual end of case activity (*e.g.*, lack of prosecution).

The findings using this subset of dispositions were generally similar to that of the prior analyses. The average time from filing the complaint to final disposition was shorter by about three and one-half months for cases subject to arbitration than for the cases not subject to arbitration (means of 307 vs. 417 days, respectively).<sup>32</sup>

<b>Days from Complaint to Final Disposition, By Whether Case Was Subject to Arbitration (Based on a Sample of Tort and Contract Cases, Selected Dispositions)</b>		
Percentage of Cases Concluded	Cases Subject to Arbitration ( <i>n</i> = 643)	Cases Not Subject to Arbitration ( <i>n</i> = 427)
25%	153 days	167 days
50% (median)	252 days	341 days
75%	386 days	564 days
90%	571 days	863 days

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<sup>31</sup> This set of analyses was more comparable to the timing analyses conducted for Pima County cases. *See infra* Section III.B.1. However, the database in Maricopa County did not contain information about whether a case had bankruptcy proceedings, so we were not able to exclude those cases as we did in Pima County. If the frequency of cases that are affected by bankruptcy proceedings in Maricopa County is similar to that in Pima County case sample (1%), the inclusion of those cases here is likely to have little effect on the findings.

<sup>32</sup>  $F(1, 1068) = 39.23, p < .001$ .



As seen in the following table, more cases subject to arbitration than not subject to arbitration were concluded within each of the first three time intervals. Conversely, more cases not subject to arbitration were concluded within each of the last three time intervals. Almost three-fourths of this subset of cases subject to arbitration were resolved within one year of filing the complaint, compared to just over half of this subset of cases not subject to arbitration.

<b>Cumulative Percentage of Cases Concluded, By Whether Case Was Subject to Arbitration (Based on a Sample of Tort and Contract Cases, Selected Dispositions)</b>				
Days from Complaint to Final Disposition	Cases Subject to Arbitration (n = 643)		Cases Not Subject to Arbitration (n = 427)	
	Percentage of Cases	Cumulative %	Percentage of Cases	Cumulative %
180 or fewer days	32%	32%	28%	28%
181 - 270 days	23%	55%	12%	40%
271 - 365 days	19%	74%	13%	53%
366 - 548 days	14%	88%	20%	73%
549 - 730 days	7%	95%	13%	86%
more than 730 days	5%	100%	14%	100%

And as noted before, the faster resolution of cases subject to arbitration does not mean they were resolved quickly; just under two-thirds of cases subject to arbitration were resolved within 330 days of the complaint. Given the case processing standards, as well as the prescribed time limits for filing the motion to set the case for trial,<sup>33</sup> a sizeable number of cases subject to arbitration had a longer time to disposition than expected.

The findings regarding the time to disposition for cases subject to arbitration raise questions about what could explain the length of time arbitration cases remain in the system in Maricopa County. How much time passes before an arbitrator is appointed? How much delay is introduced by arbitrator re-appointments or by attorney requests for continuances? Do arbitrators schedule hearings and file awards in a timely manner? How much time to disposition is added by appealing the award? The existing court database did not contain information about the timing of these intermediate events to answer these questions. Accordingly, we examined the case docket in a sample of cases assigned to arbitration to obtain this information.

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<sup>33</sup> The case will be placed on the inactive calendar if a motion to set is not filed within nine months of the complaint and will be dismissed if the motion to set is not filed two months after that (*i.e.*, 330 days after the complaint). *See* Ariz. R. Civ. P. 38.1(d).

### **3. The Composition and Disposition of Cases Assigned to Arbitration**

The findings reported in this part pertain *only* to the subset of cases that were *assigned* to arbitration, not to all cases *subject* to arbitration.<sup>34</sup> Cases typically are assigned to arbitration after the answer is filed.<sup>35</sup> Unless otherwise noted, the findings reported here are based on information obtained from a database the court provided containing all cases assigned to arbitration that concluded in calendar year 2003.<sup>36</sup>

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<sup>34</sup> Cases assigned to arbitration were approximately one-third of all cases subject to arbitration. *See supra* Section III.A.1. The composition and disposition of cases *subject* to arbitration is shown, *supra, Id.*. An unknown but presumably very small number of cases assigned to arbitration entered by stipulation even though they were not subject to arbitration. *See* Ariz. R. Civ. P 72(c).

<sup>35</sup> *See supra* Section II.B.1.

<sup>36</sup> We discovered that the original database of 6,104 cases that the court had provided contained a sizeable number of duplicate entries, most of which had the same disposition code but a different disposition date. Court staff advised that, in these cases, the multiple entries reflected the receipt of multiple copies of the same filing (which practice has since been stopped), and the earliest date was the correct one to use. Most of the remaining duplicate entries involved a change in the disposition code, typically reflecting resolution following appeal, and the most recent information was correct.

A total of 4,920 cases assigned to arbitration concluded in calendar year 2003. Thus, cases *assigned* to arbitration comprised 14% of all civil cases filed.<sup>37</sup> As shown in the table below, the majority of cases assigned to arbitration were tort motor vehicle cases (54%). Contract cases comprised the next largest groups of cases (30%), followed by tort non-motor vehicle cases (12%). Case types other than these types of tort and contract cases made up only four percent of cases assigned to arbitration.<sup>38</sup> When looking at only these three categories of tort and contract cases, cases *assigned* to arbitration comprised 25% of cases filed in these categories.<sup>39</sup>

<b>Composition of Cases Assigned to Arbitration that Concluded in 2003</b> (n = 4,920)		
Case Type	Number of Cases	Percentage of Cases
Tort motor vehicle	2,636	54%
Tort non-motor vehicle	586	12%
Contract	1,474	30%
Other	224	4%

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<sup>37</sup> See *infra* Section III.C. This figure is an approximation because the number of civil cases filed was based on fiscal year data while the number of cases assigned to arbitration was based on calendar year data. As noted earlier, cases *subject* to arbitration represented 42% of all civil cases filed. See *supra* Section III.A.1.

<sup>38</sup> Four percent of cases assigned to arbitration were non-classified civil cases (201 cases), and less than one percent were medical malpractice (21) or appeal/review cases (2).

<sup>39</sup> See *infra* Section III.C. For the composition of cases subject to arbitration, see *supra* Section III.A.1.

Of all cases assigned to arbitration that concluded in 2003, at least 44% had a hearing.<sup>40</sup> Forty-eight percent of cases were dismissed either before a hearing or after a hearing but before the award was filed, and 9% were dismissed for lack of prosecution or involved a default judgment prior to appeal. Thirty-four percent of cases assigned to arbitration were resolved by an arbitration award or by settlement after the award but before appeal. Eight percent of cases assigned to arbitration were settled or dismissed after appeal, and 2% were resolved by trial judgment after appeal.

<b>Final Disposition of Cases Assigned to Arbitration that Concluded in 2003</b> <i>(n = 4,920)</i>		
Disposition Type	Number of Cases	Percentage of Cases
Dismissed for lack of prosecution	364	7%
Default judgment	89	2%
Settled/dismissed prior to appeal filed	2,349	48%
Award filed, no appeal	1,658	34%
Settled/dismissed after appeal filed	371	8%
Trial judgment	89	2%

\_\_\_\_\_Of cases in which an award was filed, 22% filed an appeal. The breakdown of arbitration appeals by type of case closely paralleled the overall composition of cases assigned to arbitration: 53% were tort motor vehicle cases, 29% were contract cases, 14% were tort non-motor vehicle cases, and 3% were other types of cases. This would suggest that the likelihood of appeal was not affected by the type of case.

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<sup>40</sup> The precise number of cases assigned to arbitration that had a hearing or that filed an appeal cannot be determined from the court's database because an unknown number of the cases designated as "dismissed prior to appeal," "dismissed for lack of prosecution," and "default judgment" actually had a hearing, and some cases in the latter two categories had filed an appeal. Accordingly, the data from the court's database probably underestimate both the hearing and appeal rate. *See infra*, Section III.A.3.b, for a more detailed breakdown of disposition types in a sample of cases assigned to arbitration.

#### **4. Progression of Cases Through the Arbitration Process** **After Assignment to Arbitration**

We examined in more detail how cases progressed through the arbitration process after they had been assigned to arbitration. The court's computerized database could not produce information about the length of time between intermediate case processing events, such as between the arbitrator appointment and the hearing. Thus, in order to obtain this information, we needed to access docket information in a sample of individual cases.

##### **a. Case Sample**

We selected a random sample of 300 contract, tort motor vehicle, and tort non-motor vehicle cases from the court's database of cases assigned to arbitration that concluded in 2003. We subsequently excluded from the sample those cases that involved bankruptcy at any time during the course of arbitration, because the automatic stay during bankruptcy proceedings could lead to an overestimate of the time to final disposition and the time between case processing events. We also excluded cases dismissed for default or lack of prosecution because it was impossible to ascertain precisely when and how (*i.e.*, settlement or abandonment) the case was resolved.

This resulted in a final sample of 279 tort and contract cases assigned to arbitration. The majority of cases in the sample (61%) were tort motor vehicle cases, 12% were tort non-motor vehicle cases, and 28% percent were contract cases.<sup>41</sup>

To collect detailed information on each of the 279 cases in the sample, the court provided us with remote access to its database of civil case information. Primarily from information contained on the "hearings and events" fields in this database, we attempted to record the following information for each case: the case type, the date the complaint and answer were filed, the date an arbitrator was first appointed, the number of re-appointments, the date the final arbitrator was appointed, the scheduled hearing date, the number of continuances, the dates on which the arbitrator's notice of decision and award were filed, whether a party appealed the award, how the case was resolved, and the date

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<sup>41</sup> The case composition of this sample was similar to that of all cases assigned to arbitration that concluded in 2003. *See supra* Section III.A.3.

of final disposition.<sup>42</sup> Not every case had information for every event. Each table below lists the number of cases (*n*) on which the findings in the table are based.

We created a more fine-grained set of disposition categories for cases assigned to arbitration than those used by the court. In a small percentage of cases, there was some ambiguity in the docket entries concerning how the case was resolved, especially when there were multiple parties or documents filed after judgment or dismissal. In these cases, we assigned the disposition that seemed to best fit the case based on our review of the docket entries, independent of the disposition code assigned in the court database.<sup>43</sup> Post-judgment filings unrelated to the merits (*e.g.*, garnishment proceedings, debtors' exams and satisfaction of judgments) were not considered when determining the final disposition of the case.

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<sup>42</sup> The authors thank Susan Minchuk for her assistance in compiling the information from the case docket.

<sup>43</sup> We recorded a different final disposition than was in the court database in 31% of the cases. Of these cases, 40% of the changes were because we used a finer gradation of dispositions to provide more detailed information. Forty-two percent reflected an updating of cases that had been appealed and now had a final disposition of the appeal. The remaining 19% of the changes in disposition might reflect a difference in interpretation, the application of a coding guideline of which we were not aware, or an incorrect disposition code entry by court staff.

As shown in the following table, 37% of the sample of cases assigned to arbitration settled before an award was filed,<sup>44</sup> while the majority (63%) involved a decision by an arbitrator.<sup>45</sup> Twenty-seven percent of cases were resolved by the filed award and 1% were resolved by an arbitrator decision on a dispositive motion. Ten percent of cases settled after the award but before an appeal was filed, and 15% settled after an appeal was filed. Four percent of cases assigned to arbitration were resolved by trial or shorttrial, 1% were resolved by summary judgment, and 4% were still pending on appeal.

<b>Final Disposition of Cases Assigned to Arbitration</b> <b>(Based on a Sample of Tort and Contract Cases, Selected Dispositions)</b> <i>(n = 279)</i>		
Disposition Type	Number of Cases	Percentage of Cases
Settled before award	104	37.3%
Arbitrator decision on dispositive motion	4	1.4%
Arbitration award filed, no appeal	75	26.9%
Settled after award but before appeal	27	9.7%
Settled after award was appealed	43	15.4%
Summary judgment on appeal of award	4	1.4%
Jury trial judgment	6	2.2%
Court trial judgment	3	1.1%
Shorttrial judgment	2	.7%
Pending on appeal	11	3.9%

Of those cases in which the arbitrator decided a dispositive motion or filed an award, 45% accepted the decision, 15% settled after the decision but before appeal, and 39% appealed. Of those cases in which an appeal was filed, 62% settled; 6% were

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<sup>44</sup> For cases designated as “settled,” the docket indicated that a stipulation to dismiss had been filed. Cases dismissed pursuant to a motion were recorded accordingly.

<sup>45</sup> The higher percentage of cases that had an arbitration award or a filed appeal in this sample than for all cases assigned to arbitration, *supra* Section III.A.3, is probably due to the exclusion of several types of dispositions (*e.g.*, lack of prosecution and default) and the inclusion of added disposition categories (*e.g.*, separating cases that settled before the award from cases that settled after an award but before an appeal was filed) in the sample. The court data probably somewhat underestimate, and the sample data probably somewhat overestimate, the actual percentage of awards and appeals.

dismissed on a motion for summary judgment; 16% had a jury, court, or shorttrial judgment; and 16% were still pending.

There were no statistically significant differences among the three case types in whether cases assigned to arbitration settled before an award versus whether an award was filed.<sup>46</sup> Nor did the three case types differ statistically significantly in whether or not the award was appealed.<sup>47</sup>

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<sup>46</sup>  $\chi^2(2) = 1.16, p = .56$ .

<sup>47</sup>  $\chi^2(2) = .89, p = .64$ .



## **b. Time from Complaint to Answer**

The filing of an answer triggers the assignment of cases to arbitration. An answer was filed within 30 days after the complaint in 24% of cases and within 60 days in 60% of cases.<sup>48</sup> An answer was filed within 150 days in most cases (93%).<sup>49</sup>

<b>Days from Complaint to Answer, Cases Assigned to Arbitration</b> ( <i>n</i> = 273)		
Number of Days	Percentage of Cases	Cumulative Percent
30 or fewer days	24%	24%
31 - 60 days	36%	60%
61 - 90 days	17%	77%
91 - 150 days	17%	93%
more than 150 days	7%	100%

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<sup>48</sup> In cases that had multiple answer dates, we recorded the date the first answer was filed. In cases that were transferred into Maricopa County Superior Court, we did not use the original complaint or answer date because that would unreasonably extend the time frame for cases being assigned to arbitration, as the case could not have been assigned to arbitration in this court before it was transferred. For those cases, we left the complaint date blank and used the date the case was transferred as the date the answer was filed.

<sup>49</sup> The length of time between filing the complaint and filing the answer ranged from 3 to 301 days and averaged 67 days. There were statistically significant differences among the three case types in the time between the complaint and the answer ( $F(2, 270) = 6.27, p < .01$ ). Contract cases had a statistically significantly shorter time between the complaint and the answer (52 days, on average) than did tort motor vehicle cases (70 days), which in turn had a shorter time interval than tort non-motor vehicle cases (88 days).

### **c. Time from Answer to Arbitrator Appointment**

According to court staff interviews, the arbitrator typically is appointed shortly after the answer is filed.<sup>50</sup> In only a few cases (3%) was an arbitrator appointed before the answer was filed.<sup>51</sup> The arbitrator was appointed within 30 days of the answer in 59% of cases and within 60 days of the answer in 84% of cases.<sup>52</sup> The arbitrator was appointed within 150 days of the answer in most cases (90%).<sup>53</sup>

<b>Timing of Arbitrator Appointment</b>				
<b>Number of Days</b>	<b>All Cases, Answer to First Arbitrator Appt. (<i>n</i> = 272)</b>	<b>Cumulative %</b>	<b>Cases with More than One Arbitrator Appointed, First to Final Appt. (<i>n</i> = 79)</b>	<b>Cumulative %</b>
30 or fewer days	59%	59%	48%	48%
31 - 60 days	25%	84%	24%	72%
61 - 150 days	6%	90%	15%	87%
more than 150 days	10%	100%	13%	100%

A single arbitrator was appointed in the majority of cases (71%).<sup>54</sup> Twenty-one percent of the cases involved one arbitrator re-appointment, 7% involved two, and 1%

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<sup>50</sup> See *supra* Section II.B.1.

<sup>51</sup> Although no longer the practice, previously arbitrators could be appointed in tort motor vehicle cases within 60 days after the complaint was filed if no answer had been filed. See *supra* Section II.B.1.

<sup>52</sup> The arbitrator was appointed, on average, within 47 days of the answer, with the longest time interval being 413 days. There were no statistically significant differences among the three case types in the length of time between the answer and the initial arbitrator appointment ( $F(2, 269) = .375, p = .687$ ).

<sup>53</sup> It is possible that the delay in appointing an arbitrator in some cases was due to waiting for a ruling on a motion to dismiss. See *supra* Section II.B.1.

<sup>54</sup> We recorded as an arbitrator re-appointment a docket entry that indicated that an arbitrator had been struck, that a notice of re-appointment had been filed, or that an arbitrator had been excused for cause. If a strike and re-appointment occurred within a short period of time, that was treated as a single re-appointment.

involved three re-appointments.<sup>55</sup> Thus, of cases in which an arbitrator was re-appointed, most involved a single re-appointment (72%).

As would be expected, the time between the answer and the final arbitrator appointment was longer if one or more arbitrator re-appointments took place than if there were no re-appointments.<sup>56</sup> Among those cases that involved one or more arbitrator re-appointments, the length of time between the first and final appointment of the arbitrator ranged from 7 days to 243 days and averaged 55 days. As the preceding table showed, the final arbitrator was appointed within 30 days of the initial appointment in almost half (48%) of cases, within 60 days in a majority (72%) of cases, and within 150 days in most cases (87%).<sup>57</sup> Not surprisingly, the more re-appointments that were required, the longer the amount of time between the answer and the final appointment of an arbitrator.<sup>58</sup>

In all, the average length of time between filing the *complaint* and the *final* appointment of the arbitrator was 129 days, ranging from 30 to 569 days. In a majority of cases (60%), the final arbitrator appointment took place within 120 days of the complaint, and in most cases (93%) it took place within 270 days. Thus, in some cases assigned to arbitration a considerable amount of time had passed before deadlines under the compulsory arbitration rules started running.<sup>59</sup>

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<sup>55</sup> Contract cases were more likely to involve a single arbitrator appointment (83%) than were either type of tort case (each 64%) ( $F(2, 276) = 4.74, p < .01$ ).

<sup>56</sup>  $F(1, 268) = 42.23, p < .001$ .

<sup>57</sup> There were no statistically significant differences among the three case types in the length of time from the answer to the final arbitrator appointment ( $F(2, 267) = .036, p = .965$ ), despite differences in whether an arbitrator was re-appointed (*see supra* note 44).

<sup>58</sup>  $F(2, 76) = 7.41, p < .01$ .

<sup>59</sup> *See* Ariz. R. Civ. P. 74(b), 75(b).

#### **d. Time from Arbitrator Appointment to Scheduled Hearing Date**

We recorded as the “scheduled hearing date” the date on which the hearing was scheduled to take place according to the notice of arbitration hearing the arbitrator filed with the court.<sup>60</sup> However, arbitrators did not always file the notice of hearing and did not always report if the hearing was cancelled because the case had settled. Thus, the absence of a hearing date did not necessarily mean that a hearing was not scheduled or did not take place, and its presence did not necessarily mean that a hearing was actually held. Nor was the date listed necessarily accurate, as arbitrators did not always file an amended notice of hearing when the hearing was rescheduled.<sup>61</sup> In these cases, the hearing date listed in the case docket would be earlier than the actual hearing date. As a result, the findings reported here are likely to underestimate the actual length of time between the arbitrator appointment and the hearing date.

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<sup>60</sup> See Appendix A for a sample “Notice of Arbitration Hearing” form. The arbitration rules do not require the arbitrator to file the notice of hearing with the court, but the Maricopa County Notice of Arbitration Hearing form says the arbitrator shall mail or deliver it to the arbitration clerk in Civil Court Administration.

<sup>61</sup> The packet the court gives to arbitrators advises that if they grant an extension, “a formal written, signed order should be forwarded to the Arbitration Department.” See Appendix A.

The hearing is supposed to take place within 60 to 120 days of the arbitrator's appointment.<sup>62</sup> The arbitrator may shorten or extend this time frame for good cause, but may not decide a motion to continue a case on the inactive calendar.<sup>63</sup> In only 39% of the cases was the hearing scheduled to take place within the prescribed time frame; in 4% it was scheduled earlier and in 57% it was scheduled later. This occurred despite the fact that the court's packet of information for the arbitrator emphasized that the hearing must be held promptly and discussed what constituted good cause.<sup>64</sup> The scheduled hearing date was within 180 days of the final arbitrator appointment in a majority of cases (76%) and within 270 days in most cases (92%).<sup>65</sup>

<b>Days from Final Arbitrator Appointment to Scheduled Hearing</b> ( <i>n</i> = 141 )		
Number of Days	Percentage of Cases	Cumulative Percent
90 or fewer days	15%	15%
91 - 120 days	28%	43%
121 - 180 days	33%	76%
181 - 270 days	16%	92%
more than 270 days	8%	100%

We tried to examine the extent to which the longer than prescribed time interval between arbitrator appointment and the hearing was the result of continuances sought by the parties. We coded a case as having a continuance if there was an order or minute entry granting a continuance in the case docket, if an amended notice of hearing was filed indicating a different hearing date, or if a motion to continue was accompanied by an apparent delay in the hearing, even if there was no order in the docket granting the

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<sup>62</sup> Ariz. R. Civ. P. 74(b).

<sup>63</sup> Ariz. R. Civ. P. 74 (a)(b).

<sup>64</sup> See Appendix A.

<sup>65</sup> The length of time between the final arbitrator appointment and the scheduled hearing ranged from 32 to 400 days and averaged 152 days. There were no statistically significant differences among the three case types in the amount of time between the arbitrator appointment and the hearing ( $F(2, 138) = .607, p = .546$ ).

continuance.<sup>66</sup> According to the available docket data, the majority of cases (62%) did not involve any continuances, 26% had a single continuance, 9% had two continuances, and 3% of the cases had three to eight continuances. These figures, however, are likely to underestimate the number of continuances granted because arbitrators did not routinely file an amended notice of hearing.<sup>67</sup> Thus, the docket data were too unreliable to accurately assess the impact of continuances on arbitration timing.

We also examined how long after the complaint the hearing was scheduled to take place. The scheduled hearing date was more than 270 days after the complaint in 48% of cases and more than 330 days after the complaint in 27% of cases.<sup>68</sup> Deadlines associated with filing the Motion to Set and Certificate of Readiness, which still apply in arbitration cases, provide a context for interpreting these findings: cases will be placed on the inactive calendar if a motion to set is not filed within nine months of the complaint and will be dismissed if the motion to set is not filed two months after that.<sup>69</sup> In addition, the packet of information the court gives to arbitrators advises that “everything” needs to be completed within the nine-month motion to set deadline.<sup>70</sup> Thus, these findings would suggest that a sizeable number of cases assigned to arbitration had filed either a motion to set or a motion to continue the case on the inactive calendar *before* the hearing was held. Because the arbitrator may not decide a motion to continue a case on the inactive calendar,<sup>71</sup> it seems likely that a fair number of cases assigned to arbitration required judicial involvement in order to be continued long enough to have a hearing.

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<sup>66</sup> We were unable to count continuances included in other motions or orders or not reflected in a filed document.

<sup>67</sup> This concern is supported by data from the attorney survey, in which more cases had a continuance, according to the reports of attorneys who served as counsel in a recent case subject to arbitration in Maricopa County. *See infra* Section IV.B.2.

<sup>68</sup> The length of time between the complaint and the scheduled hearing ranged from 112 to 680 days and averaged 281 days. There were no statistically significant differences among the three case types in the amount of time between the arbitrator appointment and the hearing ( $F(2, 136) = 2.05, p = .133$ ).

<sup>69</sup> Ariz. R. Civ. P. 38.1(d).

<sup>70</sup> *See* Appendix A. The fact that the notice of appeal is entitled “Appeal from Arbitration Award and Motion to Set for Trial” (emphasis added) and is treated similar to the motion to set in terms of triggering discovery deadlines (compare Ariz. R. Civ. P. 76(g)(3) and 38.1(a)) would suggest that the hearing should be completed before the motion to set is filed and, thus, before that nine-month filing deadline.

<sup>71</sup> Ariz. R. Civ. P. 74 (a)(b).

### **e. Timing of the Notice of Decision and the Award**

The arbitrator is supposed to render a decision and notify the parties of that decision in writing within 10 days of the hearing.<sup>72</sup> Although the arbitrator is not required under state or local arbitration rules to file a notice of decision with the court, the packet of information the court provides arbitrators, as well as the sample form, says the arbitrator must file a notice of decision with the court within 10 days of the hearing.<sup>73</sup> As shown in the following table, among those cases in which a notice of decision was filed, it was filed within 10 days of the scheduled hearing date in only 43% of cases. The notice of decision was filed within 25 days after the scheduled hearing date in a majority of cases (76%) and within 60 days in most cases (94%).<sup>74</sup>

As noted before, however, the hearing date recorded in the case docket was not necessarily updated when hearings were rescheduled. In addition, it is possible that arbitrators filed the notice of decision with the court after they had notified the parties. As a result, these findings might overestimate the time between the actual hearing and the notice of decision and, thus, overstate noncompliance with the deadline. Data from the attorney survey suggested that these factors might indeed have affected the findings here regarding the ten-day deadline, but the percentage of notices filed in the other time intervals reported here was relatively consistent with attorney reports.<sup>75</sup>

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<sup>72</sup> Ariz. R. Civ. P. 75(a).

<sup>73</sup> See Appendix A for the arbitrator packet and a sample notice of decision.

<sup>74</sup> The length of time between the scheduled hearing date and the notice of decision ranged from zero days to 146 days and averaged 20 days. There were no statistically significant differences among the three case types in the length of time from the hearing to the notice of decision ( $F(2, 94) = .86, p = .43$ ).

<sup>75</sup> Sixty-three percent of Maricopa County attorneys said they received the notice of decision within 10 days of the hearing, and 86% said they received it within 25 days. See *infra* Section IV.B.4.

Timing of the Notice of Decision and the Award				
Number of Days	From Hearing to Notice of Decision ( <i>n</i> = 97 )	Cumulative %	From Notice of Decision to Award ( <i>n</i> = 118 )	Cumulative %
10 or fewer days	43%	43%	16%	16%
11 - 25 days	33%	76%	47%	63%
26 - 60 days	18%	94%	32%	95%
more than 60 days	6%	100%	5%	100%

The arbitrator is supposed to file the award within 25 days of the notice of decision.<sup>76</sup> As shown in the preceding table, the award was filed within the prescribed time frame in 63% of cases and within 60 days of the notice of decision in most cases (95%).<sup>77</sup>

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<sup>76</sup> Ariz. R. Civ. P. 75(a).

<sup>77</sup> The length of time between the notice of decision and the award ranged from 3 to 137 days and averaged 25 days. There was a statistically significant difference among the case types in the length of time between the notice of decision and award ( $F(2, 115) = 4.31, p < .05$ ): contract cases had a longer average time interval (35 days) than tort motor vehicle cases (22 days), while tort non-motor vehicle cases (26 days) did not differ from either.



#### **f. Time from Arbitrator Appointment to Award**

A measure of the timing of arbitration case processing that is not affected by any potential problems associated with the recorded date for the hearing or the notice of decision is the time between arbitrator appointment and the filing of the award. The arbitrator is supposed to file the award within 145 days of his or her appointment, or the Clerk is to refer the case to the judge for “appropriate action.”<sup>78</sup> Although judges may act in some cases, this monitoring and referral is not routinely done. As shown in the following table, in only 35% of cases was an award filed within 145 days of the final appointment of the arbitrator;<sup>79</sup> 65% of awards were filed later. Just over half of awards (53%) were filed within 180 days of the arbitrator’s appointment and most (86%) were filed within 270 days.<sup>80</sup>

<b>Days from Final Arbitrator Appointment to Award</b> ( <i>n</i> = 149 )		
Number of Days	Percentage of Cases	Cumulative %
120 or fewer days	17%	17%
121 - 145 days	18%	35%
146 - 180 days	18%	53%
181 - 270 days	33%	86%
more than 270 days	14%	100%

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<sup>78</sup> Ariz. R. Civ. P. 75(b).

<sup>79</sup> Although the wording of Ariz. R. Civ. P. 75(b) is “after the *first* appointment of *an* arbitrator” (emphasis added), we have conducted this analysis using the date of appointment of the arbitrator who heard the case, who may not be the first arbitrator appointed. If instead we calculated the time from the appointment of the *first* arbitrator to the date the award was filed, even fewer cases (29%) would be in compliance with the Rule. In addition, it is worth noting that although Rule 75(b) specifies 145 days, this is not consistent with the sum of 155 days based on Rule 74(b) permitting 120 days from the arbitrator’s appointment to the hearing, plus Rule 75(a) permitting 35 days from the hearing to the award.

<sup>80</sup> The length of time between the final arbitrator appointment and the award ranged from 20 to 603 days and averaged 191 days. There were no statistically significant differences among the three case types in the time from final arbitrator appointment to award ( $F(2, 146) = .56, p = .57$ ).

### **g. Total Time from Complaint to Final Disposition**

The prior sections examined the time interval between each of the events in the arbitration process; here we examine the total time from case filing to final disposition for cases assigned to arbitration.<sup>81</sup> The average time from filing the complaint to final disposition for cases assigned to arbitration, combined across dispositions, was 370 days, with a range of 27 to 1336 days.<sup>82</sup>

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<sup>81</sup> For the time to disposition of cases subject to arbitration by whether they were assigned to arbitration, *see supra* Section III.A.1. Although the present sample excluded cases assigned to arbitration that were dismissed for default or lack of prosecution, the time to disposition was generally similar when those dispositions were included. The main difference was that exclusion of those cases reduced the time to disposition at the 50<sup>th</sup> and 75<sup>th</sup> percentiles by over one month. *Id.* For the time to disposition of cases subject to arbitration, regardless of assignment to arbitration, *see supra* Section III.A.2.

<sup>82</sup> There were statistically significant differences among the three case types in the length of time from the complaint to final disposition ( $F(2, 262) = 3.48, p < .05$ ). Tort non-motor vehicle cases had a longer average time from complaint to disposition (449 days) than did tort motor vehicle cases (332 days) or contract cases (381 days). These differences seemed to be due largely to differences among the case types in the amount of time from complaint to answer, as tort non-motor vehicle cases did not differ from contract and tort motor vehicle cases in the type of disposition or in the length of time between other case processing events. *See supra*.

As shown in the following tables and graph, the amount of time from filing to final disposition varied depending on the type of disposition.<sup>83</sup> Cases that settled<sup>84</sup> before an award were concluded more quickly (on average, in 275 days) than were all other types of dispositions (averages ranging from 343 to 693 days). Cases that were concluded by the filing of the arbitration award did not differ statistically significantly in the time from complaint to disposition from cases that settled after the award but before appeal (averaging 344 and 343 days, respectively). Not surprisingly, both of these groups of cases that did not appeal the award were concluded more quickly than were cases that did appeal (averaging 565 and 693 days).

<b>Days from Complaint to Disposition, Cases Assigned to Arbitration, By Disposition</b>						
<b>Mean and Percentage of Cases Concluded</b>	<b>All Cases (<i>n</i> = 265)</b>	<b>Settled Before Award (<i>n</i> = 104)</b>	<b>Award (<i>n</i> = 73)</b>	<b>Settled After Award, Before Appeal (<i>n</i> = 27)</b>	<b>Settled After Appeal (<i>n</i> = 43)</b>	<b>Judgment (<i>n</i> = 11)</b>
Mean	370	275	344	343	565	693
25%	229	163	241	279	427	447
50% (median)	324	238	307	335	517	525
75%	460	347	386	398	701	992
90%	624	509	576	469	899	1288

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<sup>83</sup>  $F(4, 260) = 34.64, p < .001$ .

<sup>84</sup> For cases that settled, we recorded the date of the order of dismissal, rather than the date of the stipulation to dismiss, as the final disposition date.

The following table shows the percentage of cases concluded within different time periods, and again illustrates the differences among types of disposition in the time from complaint to disposition. Over half of the cases that settled before an award was filed (56%) were resolved within 9 months of the complaint, compared to 41% of cases resolved by the award, 22% that settled after the award but before appeal. Clearly, cases assigned to arbitration, even those that settled before an award, did not conclude “early.” Most of the cases that were resolved without appeal were concluded within 18 months (548 days) of the complaint, whereas just over half of cases that appealed were resolved within that length of time.

<b>Cumulative Percentage of Cases Concluded, Cases Assigned to Arbitration, By Disposition</b>						
<b>Number of Days from Complaint to Final Disposition</b>	<b>All Cases (n = 265 )</b>	<b>Settled Before Award (n = 104)</b>	<b>Award (n = 73)</b>	<b>Settled After Award, Before Appeal (n = 27)</b>	<b>Settled After Appeal (n = 43)</b>	<b>Judgment (n = 11)</b>
180 or fewer days	15%	33%	7%	4%	0	0
181 - 270 days	37%	56%	41%	22%	5%	0
271 - 365 days	60%	79%	68%	59%	19%	0
366 - 548 days	85%	94%	89%	100%	56%	54%
549 - 730 days	94%	99%	96%	--	81%	64%
more than 730 days	100%	100%	100%	--	100%	100%

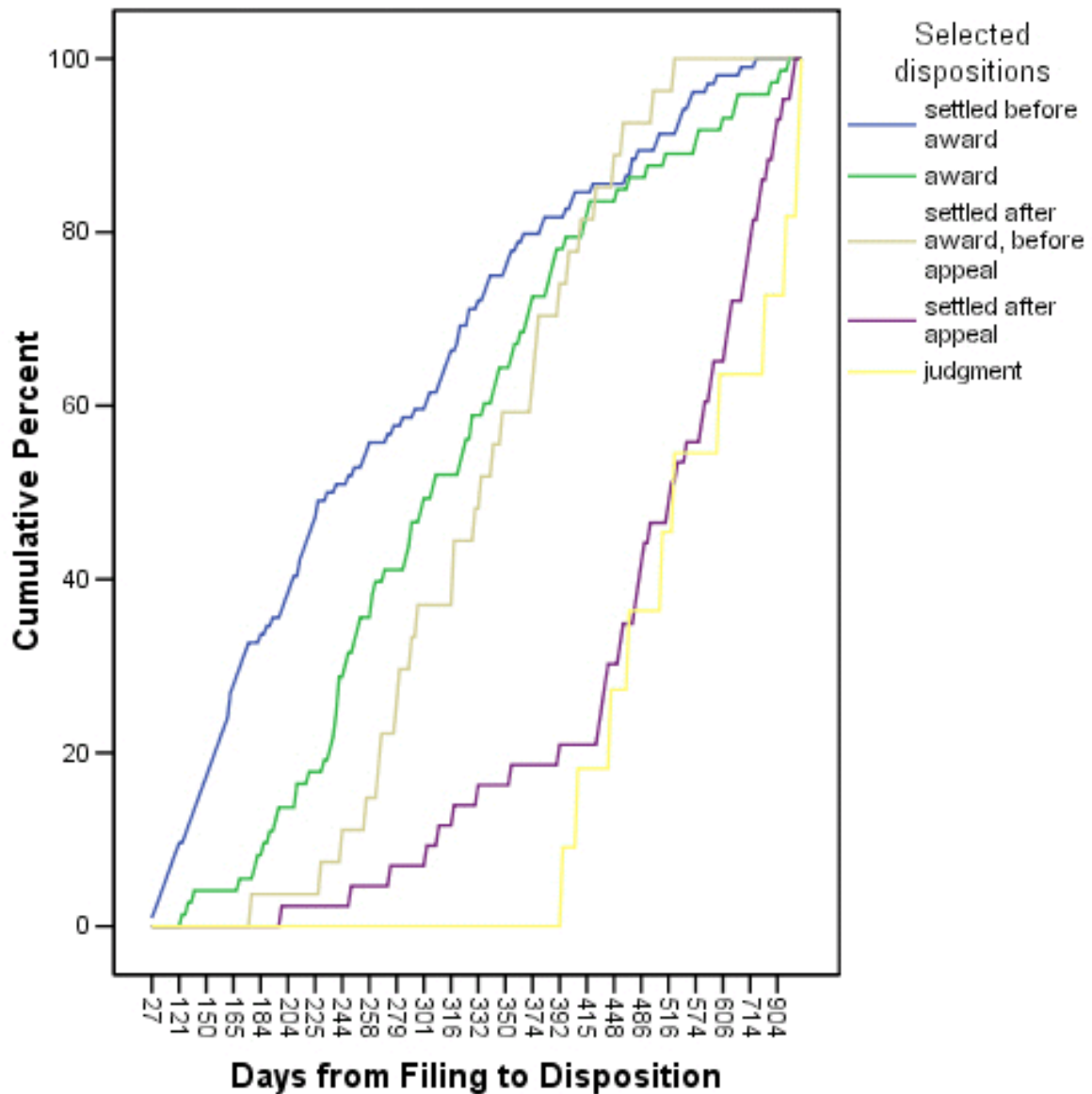
The deadline for filing an appeal is 20 days after the award is filed,<sup>85</sup> and the deadline for completing discovery after filing the appeal is 80 days.<sup>86</sup> Among cases in which an appeal was filed, the length of time between the award and the final disposition (settlement or judgment) ranged from 32 to 481 days and averaged 232 days.

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<sup>85</sup> Ariz. R. Civ. P. 76(a).

<sup>86</sup> See *supra* note 70. The court, however, may extend the time for discovery for good cause. Ariz. R. Civ. P. 76(g)(4).

The following graph further illustrates the differences by type of disposition in the time from the complaint to final disposition for cases assigned to arbitration. In addition, it shows the wide range in the length of time from the complaint to final disposition, even for cases that settled before an award was filed or that were concluded by the award.



## **h. Timing of Pre-Award Settlements**

In the preceding section, we noted the long time from complaint to disposition for cases assigned to arbitration that settled before an award was filed. We attempted to explore when these cases settled in relation to other arbitration events.

Unfortunately, we were not able to reliably determine when cases settled in relation to the scheduled hearing date.<sup>87</sup> Of the 104 cases that settled before an award was filed, 69% did not have a notice of hearing listing a hearing date. We cannot conclude, however, that such a large percentage of cases settled before a hearing was scheduled, because the hearing date also was missing in some cases in which an award was filed and, thus, in which a hearing was held. Of the cases that had a hearing date listed, only 16% settled before that date. However, we assume this small percentage reflects the fact that arbitrators did not routinely amend the notice of hearing when the hearing was rescheduled. Accordingly, we were not able to determine from the docket data whether cases settled long in advance of, or shortly before, the hearing date.<sup>88</sup>

In order to examine the timing of settlement within the arbitration process, the appointment of the arbitrator was the only arbitration event available for virtually all cases assigned to arbitration that settled before an award. It is not that we would expect arbitrator appointment to be a stimulus to settlement, but rather that we can use the data of the time from the final arbitrator appointment to the scheduled hearing date as a rough proxy of when hearings typically took place.

As the following table shows, among cases assigned to arbitration that settled before an award, 34% of cases assigned to arbitration settled within 90 days of the final appointment of an arbitrator, whereas in only 15% of cases was the arbitration hearing scheduled to take place in that time frame.<sup>89</sup> The cumulative percentage of cases settled at each subsequent interval, however, roughly paralleled the cumulative percentage of cases with hearings scheduled for that interval. While any conclusions drawn from this rough comparison are only tentative, this would seem to suggest that the small proportion

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<sup>87</sup> See *supra* Section III.A.3.e.

<sup>88</sup> In the survey of Maricopa County attorneys, among those who had recently represented a client in arbitration in a case that settled before the hearing, 28% said the case settled before a hearing date was set, 20% said it settled more than one month before the hearing, and 52% said it settled within a month of the hearing. See *infra* Section IV.B.2. We do not know, however, whether the survey findings are representative of all cases, as it is possible that when asked to recall their most recent case in arbitration, attorneys focused on cases that went farther in the arbitration process.

<sup>89</sup> See *supra* Section III.A.3.d.

of cases assigned to arbitration that settled “early” tended to settle well in advance of when hearings typically were scheduled to take place, but that most other cases tended to settle roughly on par with when hearings were scheduled to occur.

<b>Days from Final Arbitrator Appointment to Settlement, Cases Assigned to Arbitration that Settled Before Award</b> <i>(n = 101)</i>		
Days from Arbitrator Appointment to Settlement	Percentage of Cases	Cumulative Percent
within 90 days	34%	34%
91 - 120 days	12%	46%
121 - 180 days	26%	72%
181 - 270 days	12%	84%
more than 270 days	16%	100%

## **B. Court-Connected Arbitration in the Superior Court of Arizona in Pima County**

In Pima County, the court does not record whether cases are “subject to arbitration” or take any other action based on the certificate on compulsory arbitration filed with the complaint. Cases are “assigned to arbitration” and the arbitrator is appointed after the Motion to Set and Certificate of Readiness for Trial is filed.<sup>90</sup> Thus, cases “subject” to arbitration in which there was no service, no answer filed, a judicial determination that the case was not eligible for arbitration, or a settlement or dismissal prior to filing the motion to set are not “assigned” to arbitration.

How the case terminates has implications for how case disposition information is recorded in the court’s computerized database and, thus, for what information is easily available for which cases.<sup>91</sup> The court uses an arbitration-specific termination code only for cases assigned to arbitration that terminate with the filing of the award. Cases *subject* to arbitration that terminate prior to assignment to arbitration, as well as cases *assigned* to arbitration that settle before a hearing or that conclude after appeal, are given the same termination codes as cases *not subject* to arbitration. As a result, the only arbitration cases that can be readily identified by termination code in the court’s computerized database are cases concluded by an arbitration award. Other cases subject to or assigned to arbitration that conclude in other ways cannot be distinguished from cases not subject to arbitration.

In addition, information on the length of time from the complaint to final disposition is not available from existing court reports or databases. Nor is information available on the timing of intermediate case processing events, such as when the motion to set was filed, the arbitrator was appointed, or the hearing was held.

Thus, in order to be able to more fully examine the performance of court-connected arbitration in Pima County, we had to supplement information available from the court’s arbitration reports with information from a sample of cases. Accordingly, the findings contained in different parts of this subsection of the report refer to different subsets of cases and are based on different sources of information, each described in more detail in their respective parts below.

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<sup>90</sup> See *supra* Section II.B.2.

<sup>91</sup> The authors thank Andy Dowdle, Manager of the Research and Statistics Division, and Sue Wachter, Manager of Calendar Services, of the Arizona Superior Court in Pima County, for providing data, information, and assistance.



The first part of this subsection compares the length of time from complaint to disposition for a sample of cases *subject* to arbitration with a sample of cases *not subject* to arbitration. The second part describes the composition and disposition of all cases *assigned* to arbitration that concluded in 2003. The third part examines in detail the progression through arbitration of a sample of cases *assigned* to arbitration.

## **1. Time from Complaint to Disposition: A Comparison of Cases Subject to Arbitration and Cases Not Subject to Arbitration**

To be able to compare the time to disposition for cases *subject* to arbitration with cases *not subject* to arbitration, we had to be able to distinguish these two sets of cases and the length of time from the complaint to final disposition. This could not be done using the court's existing computerized database. Accordingly, we needed to use a different data source to compare the time to disposition for cases subject to arbitration and cases not subject to arbitration.<sup>92</sup>

### **a. Case Sample**

From a court-provided list of all civil cases concluded during each month of 2003, we selected cases concluded in the months of September, October, and November. In order that comparisons of the time to disposition for cases subject to arbitration and not subject to arbitration would be meaningful, these two sets of cases needed to be as comparable as possible in terms of composition and disposition.<sup>93</sup>

Accordingly, we limited the sample to tort motor vehicle, tort non-motor vehicle, and contract cases because the other case types either are not, or are unlikely to be, subject to arbitration.<sup>94</sup> In addition, we excluded types of dispositions that were not likely

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<sup>92</sup> Because identifying which cases were *subject* to arbitration and which cases were not, and then recording information about each case, was extremely time consuming, we did this only for a subset of case dispositions that we used for conducting the time to disposition comparisons (*see infra* notes 94 and 95 and accompanying text). Accordingly, we cannot report findings for Pima County regarding the composition and disposition of tort and contract cases *subject* to arbitration comparable to those reported for Maricopa County (*see supra* Section III.A.1).

<sup>93</sup> For instance, we would not want to include non-classified civil cases in these comparisons, because they comprised a sizeable proportion (35%) of all civil cases but typically would not be subject to arbitration, and comprised less than 4% of cases assigned to arbitration. *See infra* Section III.B.2 and Section III.C. Excluding "nonlitigious" case types (primarily non-classified cases) for the purpose of calculating the time to disposition is consistent with the National Center for State Courts' Trial Court Performance Standards and Measurement System, Measure 2.1.1 (available online at [http://www.ncsconline.org/D\\_Research/TCPS/](http://www.ncsconline.org/D_Research/TCPS/)).

<sup>94</sup> Appeals from municipal or justice courts are not subject to compulsory arbitration, and most tax, eminent domain, and non-classified cases (*e.g.*, petitions for name change, domestication of foreign judgment, forfeiture, forcible detainer, quiet title) generally would not be subject to arbitration because they are likely to seek affirmative relief for other than a money judgment. Most medical malpractice cases

to involve actively contested lawsuits (*e.g.*, lack of service, default judgment), for which the “disposition” was not “final” (*e.g.*, transferred to another court, otherwise removed), and for which the final disposition date was likely to be considerably later than the actual end of case activity (*e.g.*, lack of prosecution, dismissed inactive). We also excluded cases with a disposition of “judgment rendered” because this category included a variety of types of judgments, most of which were on the above list of excluded dispositions.<sup>95</sup> We subsequently excluded from the sample six cases that involved bankruptcy because the automatic stay during bankruptcy proceedings could lead to an overestimate of the time to disposition and the time between arbitration events.

To collect detailed information on each of the cases in the sample, the court provided us with remote access to its database of civil case information, including the electronic imaging functions, which allowed us to view each document in the court file. Based on docket entries, supplemented by information contained in motions, notices and minute entries, we attempted to record the following information for each case in the sample: the case type, whether the plaintiff certified the case was subject to arbitration at the time the pleadings were filed, the dates the complaint and answer were filed, the date the motion to set was filed, how the case was resolved, and the date of final disposition.<sup>96</sup> Not every case had information for every event. Each table below lists the number of cases (*n*) on which the findings in the table are based.

For each case in this subset of claim and disposition types, we examined the certificate on compulsory arbitration that was filed with the complaint to determine whether, at the time of filing, the plaintiff considered the amount in controversy to be below the arbitration program’s jurisdictional limit. Thus, we coded most cases as either “subject” or “not subject” to arbitration based on the initial certificate, but we also noted if that designation changed at some later point in time. This resulted in a sample of 237 cases subject to arbitration and 178 cases not subject to arbitration according to the initial certificate. An additional group of cases had a change in arbitration status: 33 cases whose status changed from “not subject” to “subject” to arbitration, and 15 cases whose status changed from “subject” to “not subject” to arbitration. For ease of analysis and discussion, we combined each group of cases whose arbitration status changed with the

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are likely to be above the arbitration jurisdictional limit. *See* Ariz. R. Civ. P. 72(b). These case types comprised only 4% of cases *assigned* to arbitration. *See supra* Section III.B.2.

<sup>95</sup> Although some of the judgments in this disposition category would have been appropriate to include in the sample, given their small number, it would have been too time consuming to go through the docket for each case in this category to determine which ones to include in the sample.

<sup>96</sup> The authors thank Katherine Winder for her assistance in compiling the information from the case docket.

group of cases that shared its ultimate status.<sup>97</sup> Thus, the final sample consisted of 270 cases subject to arbitration and 193 cases not subject to arbitration.

The majority of contested cases subject to arbitration were tort motor vehicle cases (68%), 14% were tort non-motor vehicle cases, and 18% percent were contract cases. Tort motor vehicle claims also comprised the largest group of contested cases in the sample of cases not subject to arbitration (45%), but this represented a statistically significantly smaller proportion than in the sample of cases subject to arbitration.<sup>98</sup> The sample of cases not subject to arbitration included a larger proportion of tort non-motor vehicle claims (33%) than did the sample of cases subject to arbitration, but a similar proportion of contract cases (22%).

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<sup>97</sup> Before we combined these groups of cases, we examined whether there were statistically significant differences in the timing between various case processing or arbitration events in order to know what impact combining them might have on the findings. Cases whose arbitration status changed from “subject” to “not subject” did not differ from cases that were always considered not subject to arbitration in terms of the length of time between case processing events (*e.g.*, from complaint to motion to set, complaint to final disposition). Nor did they differ in the type of final disposition, with the exception that cases whose arbitration status changed were more likely to still be pending at the time we reviewed the case file. As a result of the lack of differences, combining both of these sets of cases to form the sample of cases “not subject to arbitration” was unlikely to have much impact on the findings.

Cases whose arbitration status changed from “not subject” to “subject” to arbitration did not differ from cases that were always considered subject to arbitration in terms of the length of time between arbitration events (*e.g.*, from arbitrator appointment to hearing). However, they did differ in the type of final disposition: cases whose status changed from “not subject” to “subject” to arbitration were half as likely to settle prior to an award (34% vs. 68%) and were more than twice as likely to be concluded by the award or by settlement after the award and before appeal (47% vs. 20%) than were cases that were always considered subject to arbitration ( $\chi^2(2) = 15.06, p < .01$ ). And cases whose arbitration status changed had a longer time from complaint to final disposition than did cases always considered subject to arbitration ( $F(1, 265) = 22.57, p < .001$ ). The above pattern of findings suggests that combining both of these sets of cases to form the sample of cases “subject to arbitration” would have little impact regarding the timing of case progression through the stages of the arbitration process, but would present a more conservative picture of the efficiency of arbitration. Nonetheless, we felt that the cases whose arbitration status changed should be treated in our analyses as cases subject to arbitration because they would be treated that way by the court, and their inclusion would present a more complete picture of the reality of how cases progress from complaint through disposition under the arbitration program.

To determine whether apparent differences between groups of cases were “true” differences (*i.e.*, statistically significant differences) or merely reflected chance variation, tests of statistical significance were conducted. The conventional level of probability for determining the statistical significance of findings is the .05 level (*i.e.*,  $p < .05$ ). RICHARD P. RUNYON & AUDREY HABER, *FUNDAMENTALS OF BEHAVIORAL STATISTICS* at 229-31 (5<sup>th</sup> ed. 1984).

<sup>98</sup>  $\chi^2(2) = 30.51, p < .001$ .

We created a more fine-grained set of disposition categories for arbitration cases than those used by the court. In a small percentage of cases, there was some ambiguity in the docket entries concerning how the case was resolved, especially when there were multiple parties or documents filed after judgment or dismissal. In these cases, we assigned the disposition that seemed to best fit the case based on our review of the docket entries, independent of the disposition code assigned to the case in the case docket. Post-judgment filings unrelated to the merits (*e.g.*, garnishment proceedings, debtor's exams, and satisfactions of judgment) were not considered when determining the final disposition of the case.

As shown in the following table, a majority of contested cases subject to arbitration (64%) settled before an award was filed. Of those, 38% settled before an arbitrator was appointed and 62% settled after an arbitrator was appointed but before an award was filed.<sup>99</sup> Thirty-six percent of cases subject to arbitration had an award. Nineteen percent of cases were resolved by the filed award and 4% settled after the award but before an appeal was filed. Eleven percent of cases subject to arbitration settled after an appeal was filed, 2% were resolved by trial, and 1% were still pending on appeal.<sup>100</sup>

<b>Final Disposition of Cases Subject to Arbitration</b> <b>(Based on a Sample of Tort and Contract Cases, Selected Dispositions)</b> <i>(n = 270)</i>		
Disposition Type	Number of Cases	Percentage of Cases
Settled before arbitrator appointed	66	24.4%
Settled before award	106	39.3%
Arbitration award filed, no appeal	52	19.3%
Settled after award but before appeal	10	3.7%
Settled after appeal filed	29	10.7%
Trial judgment	4	1.5%
Pending on appeal	3	1.1%

Virtually all contested cases in the sample that were not subject to arbitration (95%) were dismissed by stipulation. Four percent were tried and 1% were pending final resolution at the time reviewed.<sup>101</sup>

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<sup>99</sup> We considered no arbitrator to have been appointed if there was no date in the docket for arbitrator appointment or arbitration events.

<sup>100</sup> The breakdown of final dispositions in the sample of arbitration cases is likely to differ from those in court reports for several reasons. First, this sample included cases *subject* to arbitration that were not assigned to arbitration, while court reports included only cases *assigned* to arbitration. Accordingly, we would expect to find a larger proportion of pre-award settlements in this sample than in court reports because this would include cases that settled before assignment to arbitration. Second, as noted before, we excluded some case and disposition types, while adding other disposition categories. Third, we were able to determine how appealed cases were concluded.

<sup>101</sup> Again, the breakdown of final dispositions in the sample of cases not subject to arbitration is likely to differ from those in court reports because it included only a subset of case and disposition types in order to make the sample more comparable to cases subject to arbitration.

## **b. Time from Complaint to Final Disposition**

As seen above, the sample of cases subject to arbitration and not subject to arbitration differed in terms of case composition and disposition, as well as the amount in controversy.<sup>102</sup> Accordingly, any observed differences in time to disposition could be due to these factors rather than to something about the arbitration process.

The average time from filing the complaint to final disposition was shorter for the sample of contested tort and contract cases subject to arbitration than for cases not subject to arbitration by, on average, over five months (means of 385 vs. 542 days, respectively).<sup>103</sup>

<b>Days from Complaint to Final Disposition, By Whether Case Was Subject to Arbitration (Based on a Sample of Tort and Contract Cases, Selected Dispositions)</b>		
Percentage of Cases Concluded	Cases Subject to Arbitration ( <i>n</i> = 267)	Cases Not Subject to Arbitration ( <i>n</i> = 191)
25%	219 days	334 days
50% (median)	370 days	495 days
75%	502 days	648 days
90%	701 days	863 days

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<sup>102</sup> Because the amount in controversy was not routinely recorded in case docket files, we were unable to make the cases more comparable by excluding cases not subject to arbitration in which the claim amount was well above the arbitration jurisdictional limit.

<sup>103</sup>  $F(1, 456) = 31.29, p < .001$ . A similar pattern was seen for only cases that settled (means of 372 and 530 days ( $F(1, 392) = 26.06, p < .001$ ). The findings reported here might be different than if other disposition and case types had been included. For differences in the length of time to disposition for cases assigned to arbitration that concluded at different points within the arbitration process, *see infra* Section III.B. 3.h.

The following table shows that twice as many contested cases subject to arbitration as not subject to arbitration were concluded within each of the first two time intervals. Conversely, twice as many cases not subject to arbitration as subject to arbitration were concluded within each of the last two time intervals. Half of the cases subject to arbitration, compared to 29% of the cases not subject to arbitration, were concluded within one year of the complaint.

<b>Cumulative Percentage of Cases Concluded, By Whether Case Was Subject to Arbitration (Based on a Sample of Tort and Contract Cases, Selected Dispositions)</b>				
Number of Days from Complaint to Final Disposition	Cases Subject to Arbitration (n = 267)		Cases Not Subject to Arbitration (n = 191)	
	Percentage of Cases	Cumulative %	Percentage of Cases	Cumulative %
180 or fewer days	19%	19%	9%	9%
181 - 270 days	15%	34%	8%	17%
271 - 365 days	16%	50%	12%	29%
366 - 548 days	32%	82%	32%	61%
549 - 730 days	10%	92%	23%	84%
more than 730 days	8%	100%	16%	100%

Regardless of whether they were subject to arbitration or not subject to arbitration, this subset of contested tort and contract cases did not meet the case processing time standards set by the Arizona Supreme Court.<sup>104</sup> As seen in the prior table, this was especially true for the earliest guideline, as only 34% of cases subject to arbitration and 17% of cases not subject to arbitration were resolved within nine months after the complaint was filed, instead of 90% as specified in the guideline. Eighty-two percent of cases subject to arbitration and 61% of cases not subject to arbitration were concluded within 18 months (548 days), compared to the 95% specified in the standard. And 92% of cases subject to arbitration and 84% of cases not subject to arbitration were concluded

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<sup>104</sup> The Arizona Supreme Court adopted the following voluntary case processing time standards for general civil cases in 1989: 90% of cases are to be concluded within 9 months of filing, 95% within 18 months, and 99% within 24 months. See Heather Dodge & Kenneth Pankey, Case Processing Time Standards in State Courts, 2002-03, Appendix B, available online at [http://www.ncsconline.org/wc/Publications/KIS\\_CasManCPTSPub.pdf](http://www.ncsconline.org/wc/Publications/KIS_CasManCPTSPub.pdf). According to the guidelines of the Conference of State Court Administrators, cases in court-connected arbitration should be held accountable to the same standards of timeliness as cases in litigation. See Roger Hanson et al., Court-Annexed Arbitration: Lessons from the Field, *State Court J.*, 4, 8 (1991).

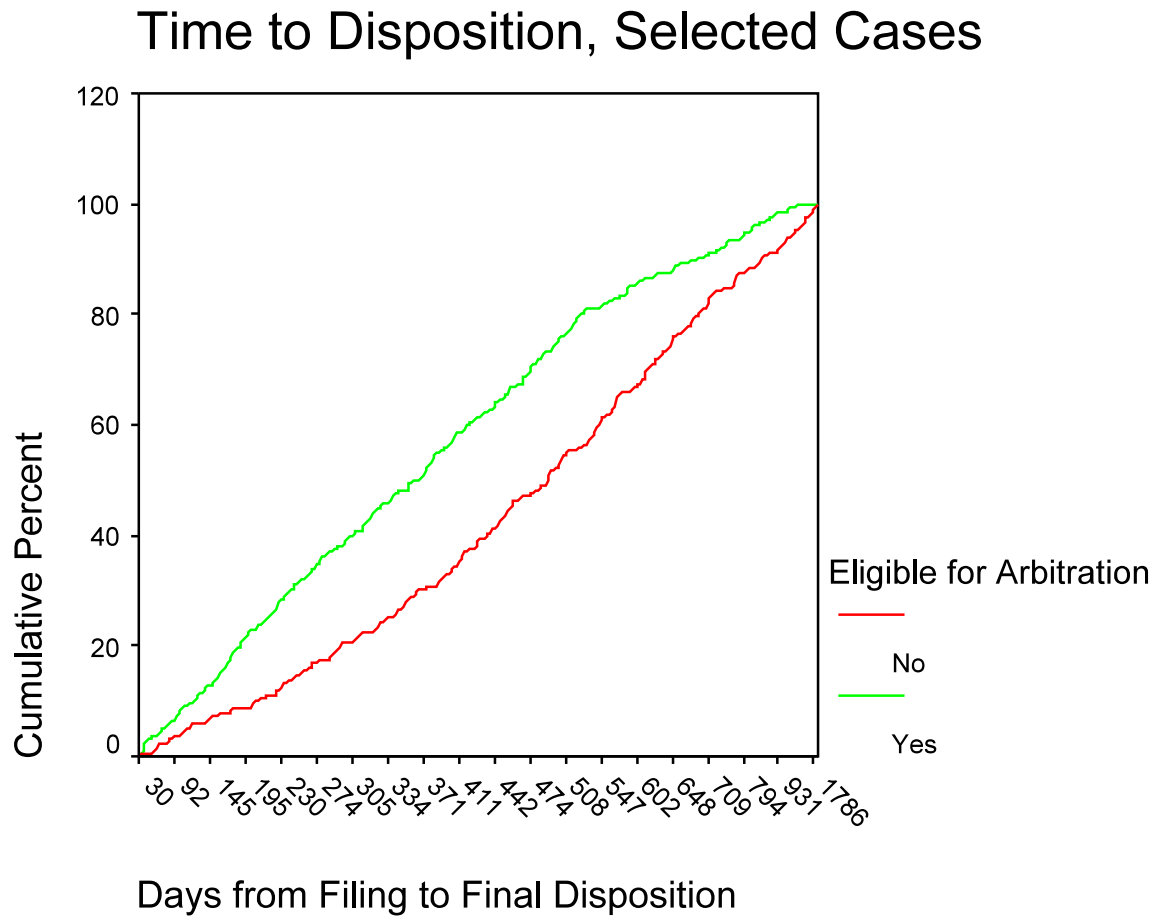


within two years (730 days), compared to the 99% specified in the standard. The time to disposition reported here likely is longer than if non-classified civil cases and non-contested cases, both of which tend to conclude more quickly, had been included.<sup>105</sup>

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<sup>105</sup> It is not clear, however, whether that would have made enough difference to close the gap between these findings and the nine-month case processing standard. *See supra* Section III.A.2 for time to disposition analyses in Maricopa County that included non-contested cases.

The following graph further illustrates differences in the time to disposition of cases subject and not subject to arbitration.



We cannot assume, however, that the fact that cases subject to arbitration were resolved more quickly than cases not subject to arbitration was related to the arbitration process rather than to differences in the amount in controversy. For instance, because cases subject to arbitration involve smaller claims, they are likely to be less complex and involve less discovery; therefore, they might tend to resolve earlier regardless of the arbitration program.

We conducted additional analyses to see if we might be able to shed some light on the observed differences in the time to disposition. The motion to set the case for trial was filed sooner after the complaint in cases subject to arbitration than in cases not subject to arbitration by, on average, 63 days.<sup>106</sup> Similarly, cases subject to arbitration were concluded sooner after the motion to set was filed than were cases not subject to arbitration by, on average, 65 days.<sup>107</sup> It is interesting that both time intervals were statistically significantly shorter in cases subject to arbitration than in cases not subject to arbitration, and that the magnitude of the difference for both intervals was virtually the same, even though the arbitration deadlines for holding a hearing and filing the award<sup>108</sup> start only after the motion to set and appointment of the arbitrator. While no firm conclusions can be drawn from these analyses, they might suggest that the observed differences in the time to disposition could very well reflect differences associated with the size of the claim rather than the impact of arbitration program deadlines.

As noted previously, because the composition of cases subject versus not subject to arbitration differed, differences between these two sets of cases in the time to disposition could reflect the effect of case composition rather than the effect of the arbitration program. To explore the possible role of case composition in the time to disposition findings, we examined time to disposition separately for each type of case. Both types of tort cases were concluded more quickly when subject to arbitration than when not subject to arbitration.<sup>109</sup> Contract cases, however, showed no statistically

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<sup>106</sup>  $F(1, 355) = 7.89$   $p < .01$ ; means of 176 and 239 days in cases subject to arbitration and not subject to arbitration, respectively. The motion to set was filed within 270 days of filing the complaint in 71% of cases subject to arbitration, compared to 55% of cases not subject to arbitration. A similar proportion of cases subject to arbitration and not subject to arbitration did not have a date listed for when the motion to set was filed, suggesting that cases in the two groups did not differ in the rate of settlement prior to filing a motion to set.

<sup>107</sup>  $F(1, 350) = 12.28$ ,  $p < .01$ ; means of 265 vs. 330 days in cases subject to arbitration and not subject to arbitration, respectively.

<sup>108</sup> Ariz. R. Civ. P. 74(b), 75(b).

<sup>109</sup> Tort motor vehicle:  $F(1, 265) = 7.38$ ,  $p < .01$ ; tort non-motor vehicle:  $F(1, 99) = 10.04$ ,  $p < .01$ .

significant difference in the time to disposition when subject to arbitration versus not subject to arbitration.<sup>110</sup> But the proportion of contract cases in the two groups also did not differ. These findings suggest that differences in the time to disposition between cases subject and not subject to arbitration do not solely reflect the mix of cases in the two groups.<sup>111</sup>

<b>Days from Complaint to Final Disposition, By Case Type &amp; Whether Case Was Subject to Arb. (Based on a Sample of Tort and Contract Cases, Selected Dispositions)</b>						
Case Type	Cases Subject to Arbitration ( <i>n</i> = 191)			Cases Not Subject to Arbitration ( <i>n</i> = 267)		
	mean	median	90 <sup>th</sup> percentile	mean	median	90 <sup>th</sup> percentile
Tort motor vehicle	380	350	693	459	443	672
Tort non-motor vehicle	432	423	731	716	590	1280
Contract	368	356	730	445	447	770

Given the case processing standards, as well as the prescribed time limits for filing the motion to set and for filing an award after the arbitrator is appointed,<sup>112</sup> a sizeable number of contested cases subject to arbitration had a longer time to disposition than expected. This raises the need for an examination of the processing of arbitration cases, including the timing of intermediate events within the arbitration process. For example, how much time passes before an arbitrator is appointed? How much delay is introduced by arbitrator re-appointments or by attorney requests for continuances? Do arbitrators schedule hearings and file awards in a timely manner? How much time to disposition is added by appealing the award? These questions are addressed *infra* in Section III.B.3.

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<sup>110</sup>  $F(1, 88) = 2.18, p = .143$ . Although there might appear to be a difference when simply comparing the means for contract cases, because it is not a statistically significant difference, it is not a “true” difference and cannot be treated as such. *See supra* note 97.

<sup>111</sup> Among cases not subject to arbitration, tort non-motor vehicle cases took longer to conclude than contract or tort motor vehicle cases ( $F(2, 188) = 11.43, p < .001$ ). Although the trend was in the same direction for cases subject to arbitration, there were no statistically significant differences in the time to disposition among the three types of cases ( $F(2, 264) = 1.03, p = .36$ ).

<sup>112</sup> The case will be placed on the inactive calendar if a motion to set is not filed within nine months of the complaint and will be dismissed if the motion to set is not filed two months after that (*i.e.*, 330 days after the complaint). *See* Ariz. R. Civ. P. 38.1(d). The arbitrator is supposed to file the award within 145 days of his or her appointment. *See* Ariz. R. Civ. P. 75(b).

## **2. The Composition and Disposition of Cases Assigned to Arbitration**

The findings reported in this part pertain *only* to the subset of cases that were *assigned* to arbitration, not to all cases *subject* to arbitration.<sup>113</sup> Cases typically are assigned to arbitration after the motion to set is filed.<sup>114</sup> Unless otherwise noted, the findings reported here are based on information obtained from court reports regarding cases assigned to arbitration that concluded in calendar year 2003.

A total of 908 cases assigned to arbitration concluded in calendar year 2003. Thus, cases *assigned* to arbitration comprised 13% of all civil cases filed.<sup>115</sup> As shown in the table below, the majority of cases assigned to arbitration were tort motor vehicle cases (70%). Contract and tort non-motor vehicle cases comprised the next largest groups of cases (14% and 12%, respectively). Other case types made up only four percent of cases assigned to arbitration.<sup>116</sup> When looking at only these three categories of tort and contract cases, cases assigned to arbitration comprised 24% of cases filed in these categories.<sup>117</sup>

<b>Composition of Cases Assigned to Arbitration that Concluded in 2003</b> ( <i>n</i> = 908)		
Case Type	Number of Cases	Percentage of Cases
Tort motor vehicle	634	70%
Tort non-motor vehicle	113	12%
Contract	126	14%
Other	35	4%

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<sup>113</sup> We do not know what proportion of cases subject to arbitration in Pima County are assigned to arbitration. An unknown, but presumably very small, number of cases assigned to arbitration entered by stipulation rather than by being subject to arbitration. *See* Ariz. R. Civ. P 72(c).

<sup>114</sup> *See supra* Section II.B.2.

<sup>115</sup> *See infra* Section III.C. This figure is an approximation because the number of civil cases in those categories was based on fiscal year data while the number of cases assigned to arbitration was based on calendar year data.

<sup>116</sup> Most of these cases were unclassified civil cases (32 cases), and 3 were medical malpractice cases.

<sup>117</sup> *See infra* Section III.C.

Among all cases assigned to arbitration that concluded in 2003, 43% had a hearing. Over half of the cases (53%) settled after assignment to arbitration but before an award was filed. Thirty-three percent of cases were resolved by an arbitration award and 2% by a motion to dismiss or for summary judgment. Ten percent of all cases assigned to arbitration were resolved in some manner following an appeal of the award or judgment.<sup>118</sup>

<b>Final Disposition of Cases Assigned to Arbitration that Concluded in 2003</b> <i>(n = 908)</i>		
Disposition Type	Number of Cases	Percentage of Cases
Settled	479	53%
Otherwise removed	31	3%
Motion to dismiss/summary judgment	14	2%
Award, no appeal	296	33%
Appeal of award or judgment	88	10%

Of cases with an award or judgment, 22% filed an appeal. The breakdown of appeals by type of case closely paralleled the overall composition of cases assigned to arbitration: 66% were tort motor vehicle cases, 16% were contract cases, 14% were tort non-motor vehicle cases, and 4% were other types of cases. This would suggest that the likelihood of appeal was not affected by the type of case.

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<sup>118</sup> How cases terminated on appeal could not be ascertained from the court database because those cases were not assigned termination codes that distinguished them from non-arbitration cases that settled or were tried. For purposes of calculating dispositions in cases not appealed, we assumed that the 88 appeals were distributed between awards and summary judgments according to the proportion of those dispositions in cases assigned to arbitration.

### **3. Progression of Cases Through the Arbitration Process** **After Assignment to Arbitration**

We examined in more detail how cases progressed through the arbitration process after they had been assigned to arbitration. The court's computerized database could not produce information about the length of time between intermediate case processing events, such as between the arbitrator appointment and the hearing. Thus, in order to obtain this information, we needed to access docket information in a sample of individual cases.

#### **a. Case Sample**

We used a subset of cases from the sample described, *supra*,<sup>119</sup> namely only the cases *assigned* to arbitration.<sup>120</sup> This resulted in a final sample of 204 tort and contract cases assigned to arbitration that concluded in 2003. We considered cases to have been assigned to arbitration if an arbitrator was appointed, and to not have been assigned if no arbitrator was appointed.<sup>121</sup>

To collect detailed information on each of the cases in the sample, the court provided us with remote access to its database of civil case information, including the electronic imaging functions, which allowed us to view each document in the court file. In addition to the case type, the dates the complaint, answer, and motion to set were filed, and the date and type of final disposition, we attempted to record the following information for each case assigned to arbitration: the date an arbitrator was first appointed, the number of re-appointments, the date the final arbitrator was appointed, the scheduled hearing date, the number of continuances, the dates on which the arbitrator's

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<sup>119</sup> See *supra*, Section III.B.1.a.

<sup>120</sup> By using this approach, it is possible that we missed a few cases that were assigned to arbitration and settled before the arbitrator was appointed. Because the primary focus of this section is on the time between arbitration events, those cases would not have had dates for arbitration events and, thus, would not have been part of the timing analyses in any event.

<sup>121</sup> Cases that involved bankruptcy or the following dispositions were excluded from the sample: lack of service, default judgment, lack of prosecution, transfer or otherwise removed, and judgment rendered. See *supra* Section III.B.1.a.

notice of decision and award were filed, and whether a party appealed the award.<sup>122</sup> Not every case had information for every event. Each table below lists the number of cases (*n*) on which the findings in the table are based.

Among the sample of cases assigned to arbitration, just over half (52%) settled before an award was filed, while 48% had an award.<sup>123</sup> Twenty-five percent of cases were resolved by the filed award. Five percent of cases settled after the award but before an appeal was filed, and 14% settled after an appeal was filed. Two percent of cases assigned to arbitration were resolved by trial, and 1% were still pending on appeal.

<b>Final Disposition of Cases Assigned to Arbitration</b> <b>(Based on a Sample of Tort and Contract Cases, Selected Dispositions)</b> <i>(n = 204)</i>		
Disposition Type	Number of Cases	Percentage of Cases
Settled before award	106	52%
Arbitration award filed, no appeal	52	25%
Settled after award but before appeal	10	5%
Settled after appeal filed	29	14%
Trial judgment on appeal	4	2%
Pending on appeal	3	1%

Of cases involving an arbitration award, 53% accepted the award, 10% settled after the award but before appeal, and 37% appealed. Of those cases in which an appeal was filed, 80% settled, 11% had a trial judgment, and 8% were still pending.

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<sup>122</sup> The authors thank Katherine Winder for her assistance in compiling this information from the case docket.

<sup>123</sup> In this sample, a higher percentage of cases had an arbitration award and a filed appeal compared to all cases assigned to arbitration, *supra* Section III.B.2. The sample excluded some case types and some dispositions and used more fine-grained categories for other dispositions. The difference in the hearing rate was minimal; it is not clear whether the sample data or the court data are more accurate for the appeal rate.



There were no statistically significant differences among the three case types in whether the case settled before an award versus whether an award was filed.<sup>124</sup> Nor did the three case types differ statistically significantly in whether or not the award was appealed.<sup>125</sup>

#### **b. Time from Complaint to Motion to Set**

\_\_\_\_\_ The filing of the motion to set the case for trial triggers the assignment of cases to arbitration. The motion to set should be filed within 270 days of the complaint.<sup>126</sup> It was filed within that time frame in 72% of cases assigned to arbitration and within one year of the complaint in virtually all cases (96%).<sup>127</sup>

<b>Days from Complaint to Motion to Set, Cases Assigned to Arbitration</b> ( <i>n</i> = 197)		
Number of Days	Percentage of Cases	Cumulative Percent
90 or fewer days	31%	31%
91 - 180 days	24%	55%
181 - 270 days	17%	72%
271 - 365 days	25%	96%
more than 365 days	4%	100%

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<sup>124</sup>  $\chi^2(2) = .90, p = .64$ .

<sup>125</sup>  $\chi^2(2) = 2.26, p = .32$ .

<sup>126</sup> The case will be placed on the inactive calendar if a motion to set is not filed within nine months of the complaint and will be dismissed if the Motion to Set is not filed two months after that. Ariz. R. Civ. P. 38.1(d) and R. 5.13, Local Rules of Practice for the Superior Court in Pima County. In Pima County, parties do not have to certify in the motion to set that they will complete discovery within 60 days. Ariz. R. Civ. P. 38.1(a)(3)(iii).

<sup>127</sup> The length of time between the complaint and the motion to set ranged from 13 to 666 days and averaged 176 days. There were no statistically significant differences among the three case types in the time from filing the complaint to the motion to set ( $F(2, 194) = 1.98, p = .141$ ).

### **c. Time from Motion to Set to Arbitrator Appointment**

According to staff interviews, the arbitrator typically is appointed after the motion to set the case for trial has been filed.<sup>128</sup> In only one case in the sample was an arbitrator appointed before the motion to set had been filed (2 days before). The arbitrator was appointed within 30 days of the motion to set in a majority of cases (59%) and within 90 days of the motion to set in most (92%) cases.<sup>129</sup>

<b>Timing of Arbitrator Appointment</b>				
<b>Number of Days</b>	<b>All Cases, Motion to Set to First Arbitrator Appt. (<i>n</i> = 197)</b>	<b>Cumulative %</b>	<b>Cases with More than One Arbitrator Appointed, First to Final Appt. (<i>n</i> = 73)</b>	<b>Cumulative %</b>
14 or fewer days	1%	1%	42%	42%
15 - 30 days	58%	59%	33%	75%
31 - 90 days	33%	92%	14%	89%
more than 90 days	8%	100%	11%	100%

A single arbitrator was appointed in the majority of cases (64%).<sup>130</sup> Twenty-six percent of the cases involved one arbitrator re-appointment, 6% involved two, and 4% involved three to seven re-appointments. Thus, of cases in which an arbitrator was re-appointed, most involved a single re-appointment (71%).<sup>131</sup>

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<sup>128</sup> See *supra* Section II.B.2.

<sup>129</sup> The arbitrator was appointed, on average, within 48 days of the motion to set, with the longest time interval being 440 days. There were no statistically significant differences among the three case types in the time from filing the motion to set to the initial arbitrator appointment ( $F(2, 194) = .41, p = .66$ ).

<sup>130</sup> We recorded as an arbitrator re-appointment a docket entry that indicated that an arbitrator had been struck, that a notice of re-appointment had been filed, or that an arbitrator had been excused for cause. If a strike and re-appointment occurred within a short period of time, that was treated as a single re-appointment.

<sup>131</sup> There were no statistically significant differences among the three case types in whether there were none versus one or more arbitrator re-appointments ( $F(2, 201) = .54, p = .59$ ).

As would be expected, the time between the motion to set and the final arbitrator appointment was longer when one or more arbitrator re-appointments took place than when there were no re-appointments.<sup>132</sup> For those cases that involved one or more arbitrator re-appointments, the length of time between the first and final appointment of the arbitrator ranged from 6 days to 276 days and averaged 38 days. As the preceding table showed, the final arbitrator was appointed within 14 days of the initial arbitration appointment in 42% of cases, within 30 days in a majority (75%) of cases, and within 90 days in most (89%) cases. Not surprisingly, the more re-appointments that were required, the longer the amount of time between the motion to set and the final appointment of the arbitrator.<sup>133</sup>

In all, the average length of time between filing the *complaint* and the *final appointment* of the arbitrator was 238 days, ranging from 47 to 692 days. In a majority of cases (61%), the final arbitrator appointment took place within 270 days of the complaint, and in most cases (86%) it occurred within one year of the complaint. Thus, in some cases assigned to arbitration, a considerable amount of time had passed before the deadlines under the compulsory arbitration rules started running.<sup>134</sup>

#### **d. Time from Arbitrator Appointment to Scheduled Hearing Date**

We recorded as the “scheduled hearing date” the date on which the hearing was scheduled to take place. This was based on one or more of the following in the docket: the scheduled hearing date on the notice of hearing the arbitrator filed with the court, the scheduled hearing date listed in a minute entry, the scheduled hearing date listed in a status report, or the hearing date listed on the award the arbitrator filed with the court.<sup>135</sup> However, the absence of a hearing date did not necessarily mean that a hearing was not scheduled or did not take place, and its presence did not necessarily mean that a hearing was actually held. Nor was the date listed necessarily accurate, as arbitrators did not always file an amended notice of hearing when the hearing was rescheduled. In these cases, the hearing date listed in the case docket would be earlier than the actual hearing

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<sup>132</sup>  $F(1, 195) = 18.53, p < .001$ .

<sup>133</sup>  $F(2, 68) = 4.92, p < .05$ . There were no statistically significant differences among the three case types in the length of time between the motion to set and the final arbitrator appointment ( $F(2, 194) = .207, p = .813$ ).

<sup>134</sup> See Ariz. R. Civ. P. 74(b), 75(b).

<sup>135</sup> Arbitrators are not required to file the notice of hearing with the court. Because we had access to more documents that might contain a hearing date in Pima County, this information is likely to be more reliable than for the Maricopa County sample.

date. As a result, the findings reported here might underestimate the actual length of time between the arbitrator appointment and the hearing.

The hearing is supposed to take place within 60 to 120 days of the arbitrators' appointment.<sup>136</sup> The arbitrator may shorten or extend this time frame for good cause, but may not decide a motion to continue a case on the inactive calendar.<sup>137</sup> In 44% of cases, the hearing was scheduled to take place within the prescribed time frame; in one case (1%) it was scheduled earlier and in 55% it was scheduled later.<sup>138</sup> The scheduled hearing date was within 180 days of the final arbitrator appointment in a majority of cases (68%) and within 270 days in most cases (92%). This lengthy time between appointment and hearing was observed even though requests for a continuance are decided by a judge and, shortly before the 120-day deadline, the court routinely sends a request for a status report if a hearing has not been held.<sup>139</sup>

<b>Days from Final Arbitrator Appointment to Scheduled Hearing</b> ( <i>n</i> = 65)		
Number of Days	Percentage of Cases	Cumulative %
90 or fewer days	17%	17%
91 - 120 days	28%	45%
121 - 180 days	23%	68%
181 - 270 days	24%	92%
more than 270 days	8%	100%

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<sup>136</sup> Ariz. R. Civ. P. 74(b).

<sup>137</sup> Ariz. R. Civ. P. 74(a),(b).

<sup>138</sup> The length of time between the final arbitrator appointment and the scheduled hearing date ranged from 67 to 447 days and averaged 148 days. There were no statistically significant differences among the three case types in the length of time between the final arbitrator appointment and the scheduled hearing date ( $F(2, 62) = 1.29, p = .282$ ).

<sup>139</sup> See *supra* Section II.B.2.

We tried to examine the extent to which the longer than prescribed time interval between arbitrator appointment and the hearing was the result of continuances sought by the parties. We coded a case as having a continuance if there was an order or minute entry granting a continuance in the case docket, if an amended notice of hearing was filed indicating a different hearing date, or if a motion to continue was accompanied by an apparent delay in the hearing, even if there was no order in the docket granting the continuance.<sup>140</sup> According to the available docket data, the majority of cases (76%) did not involve any continuances, 17% had a single continuance, and 7% of cases had two to five continuances. These figures, however, are likely to underestimate the number of continuances granted because arbitrators did not routinely file an amended notice of hearing.<sup>141</sup> Thus, the docket data were too unreliable to examine the impact of continuances on arbitration timing.

\_\_\_\_\_ We also examined how long after the complaint the hearing was scheduled to take place. The scheduled hearing date was more than 270 days after the complaint was filed in 83% of cases and more than 330 days after the complaint in 62% of cases. The scheduled hearing date was more than a year after the complaint was filed in 54% of cases and was more than eighteen months after the complaint in 20% of cases.<sup>142</sup> Thus, in a majority of cases, the hearing was scheduled to take place long after the time at which cases should be ready to be set for trial.<sup>143</sup>

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<sup>140</sup> We were unable to count continuances not reflected in a filed document.

<sup>141</sup> This concern is supported by data from the attorney survey, in which more cases had a continuance, according to the reports of attorneys who served as counsel in a recent case subject to arbitration in Pima County. *See infra* Section IV.B.2.

<sup>142</sup> The length of time between the complaint and the scheduled hearing date ranged from 142 to 796 days and averaged 414 days. There were no statistically significant differences among the three case types in the length of time between the complaint and the scheduled hearing date ( $F(2, 62) = 1.40, p = .254$ ).

<sup>143</sup> *See supra* note 112.

#### **e. Timing of the Notice of Decision and the Award**

The arbitrator is supposed to render a decision and notify the parties of that decision in writing within 10 days of the hearing.<sup>144</sup> As shown in the following table, among those cases in which a notice of decision was filed, it was filed within 10 days of the scheduled hearing date in 60% of cases and within 25 days after the scheduled hearing date in a majority of cases (84%).<sup>145</sup> As noted before, however, the hearing date recorded in the case docket was not necessarily updated when hearings were rescheduled. In addition, it is possible that arbitrators filed the notice of decision with the court after they had notified the parties. As a result, these findings might overestimate the time between the actual hearing and the notice of decision and, thus, overstate noncompliance with the deadline. Data from the attorney survey, however, were generally consistent with the present findings.<sup>146</sup>

<b>Timing of the Notice of Decision and the Award</b>				
<b>Number of Days</b>	<b>From Hearing to Notice of Decision (<i>n</i> = 57 )</b>	<b>Cumulative %</b>	<b>From Notice of Decision to Award (<i>n</i> = 80)</b>	<b>Cumulative %</b>
10 or fewer days	60%	60%	22%	22%
11 - 25 days	24%	84%	59%	81%
25 - 60 days	5%	89%	16%	97%
more than 60 days	11%	100%	3%	100%

The arbitrator is supposed to file the award within 25 days of the notice of decision.<sup>147</sup> As shown in the preceding table, the award was filed within the prescribed

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<sup>144</sup> Ariz. R. Civ. P. 75(a). The arbitrator is not required under state or local Arbitration Rules, however, to file the Notice of Decision with the court.

<sup>145</sup> The length of time between the scheduled hearing date and the date the notice of decision was filed ranged from zero days to 137 days and averaged 20 days. Contract cases had a statistically significant longer interval between the scheduled hearing date and the notice of decision (mean of 66 days) than did either type of tort case (means of 13 and 18 days) ( $F(2,54) = 9.52, p < .001$ ).

<sup>146</sup> Sixty-nine percent of Pima County attorneys said they received the notice of decision within 10 days of the hearing, and 89% said they received it within 25 days. *See infra* Section IV.B.4.

<sup>147</sup> Ariz. R. Civ. P. 75(a).

time frame in 81% of cases and within sixty days of the notice of decision in virtually all cases (97%).<sup>148</sup>

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<sup>148</sup> The length of time between the notice of decision and the award ranged from zero days to 312 days and averaged 24 days. Contract cases had a statistically significant longer interval between the notice of decision and the award (mean of 65 days) than did either type of tort case (means of 19 and 22 days) ( $F(2,77) = 5.55, p < .01$ ).

#### **f. Time from Arbitrator Appointment to Award**

A measure of the timing of arbitration case processing that is not affected by any potential problems associated with the recorded date of the hearing or the notice of decision is the time between the final arbitrator appointment and the filing of the award. The arbitrator is supposed to file the award within 145 days of his or her appointment, or the Clerk is to refer the case to the judge for “appropriate action.”<sup>149</sup> Although the court monitors the hearing date, it appears the deadline for the award is not routinely enforced. As shown in the following table, in only 34% of cases was an award filed within the prescribed time frame; 66% of awards were filed later. Just over half (52%) of the awards were filed within 180 days of the arbitrator’s appointment and most (83%) were filed within 270 days, with the longest interval being 560 days.<sup>150</sup>

<b>Days from Final Arbitrator Appointment to Award</b> ( <i>n</i> = 88 )		
Number of Days	Percentage of Cases	Cumulative %
fewer than 120 days	17%	17%
121 - 145 days	17%	34%
146 - 180 days	18%	52%
181 - 270 days	31%	83%
more than 270 days	17%	100%

#### **g. Total Time from Complaint to Final Disposition**

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<sup>149</sup> Although the wording of Ariz. R. Civ. P. 75(b) is “after the *first* appointment of *an* arbitrator” (emphasis added), we have conducted this analysis using the date of appointment of the arbitrator who heard the case, who may not be the first arbitrator appointed. If instead we calculated the time from the appointment of the *first* arbitrator to the date the award was filed, even fewer cases (31%) would be in compliance with the Rule. In addition, it is worth noting that although Rule 75(b) specifies 145 days, this is not consistent with the sum of 155 days, based on Rule 74(b) permitting 120 days from the arbitrator’s appointment to the hearing, plus Rule 75(a) permitting 35 days from the hearing to the award.

<sup>150</sup> The length of time between the final arbitrator appointment and award ranged from 72 to 560 days and averaged 199 days. Contract cases had a statistically significant longer interval between the final arbitrator appointment and award (mean of 284 days) than did either type of tort case (mean of 186 and 197 days) ( $F(2,85) = 4.93, p < .01$ ).



The prior sections examined the time interval between each of the events in the arbitration process; here we examine the total time from case filing to final disposition for cases assigned to arbitration.<sup>151</sup> The average time from filing the complaint to final disposition for cases assigned to arbitration, combined across dispositions, was 445 days, with a range of 63 to 1383 days.<sup>152</sup>

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<sup>151</sup> For the time to disposition of cases subject to arbitration, including those that concluded prior to assignment to arbitration, *see supra* Section III.B.1.

<sup>152</sup> There were statistically significant differences among the three case types in the length of time from the complaint to final disposition ( $F(2, 198) = 4.18, p < .05$ ). Contract cases had a longer average time from filing to disposition (520 days) than did tort motor vehicle cases (420 days), while the time to disposition for tort non-motor vehicle cases (497 days) did not differ from either. The longer time to disposition for contract cases seems to be due largely to a longer time interval for contract cases between the scheduled hearing date and the notice of decision, and between the notice of decision and the award, as there were no differences among the case types in the type of disposition or in the length of time between other case processing events. *See supra*.

As shown in the following tables and graph, the amount of time from filing to final disposition varied depending on the type of disposition.<sup>153</sup> Cases that settled<sup>154</sup> before an award were concluded more quickly (on average, in 392 days) than cases that appealed the award (averaging 642 for cases that settled post-appeal and 680 days for cases that went to trial). However, cases that settled before an award were not concluded more quickly than cases that did not appeal the award (averaging 416 days for cases resolved by the award and 488 days for cases that settled after the award but before appeal). Cases that were concluded by the filing of the arbitration award did not differ statistically significantly in their time from filing to disposition from cases that settled after the award but before appeal. Not surprisingly, both of these groups of cases that did not appeal the award were concluded more quickly than were cases that did appeal (averaging 642 days for cases that settled post-appeal and 680 days for cases that went to trial).

<b>Days from Complaint to Final Disposition, Cases Assigned to Arbitration, By Disposition</b>						
<b>Mean and Percentage of Cases Concluded</b>	<b>All Cases (<i>n</i> = 201)</b>	<b>Settled Before Award (<i>n</i> = 106)</b>	<b>Award (<i>n</i> = 52)</b>	<b>Settled After Award, Before Appeal (<i>n</i> = 10)</b>	<b>Settled After Appeal (<i>n</i> = 29)</b>	<b>Trial Judgment (<i>n</i> = 4)</b>
Mean	445	392	416	488	642	680
25%	298	259	312	293	420	598
50% (median)	419	374	418	450	648	666
75%	520	480	503	647	816	778
90%	740	633	622	964	894	794

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<sup>153</sup>  $F(4, 196) = 12.08, p < .001$ .

<sup>154</sup> For cases that settled, we recorded the date of the order of dismissal, rather than the date of the stipulation to dismiss, as the final disposition date.

The following table shows the percentage of cases concluded within different time periods, and again illustrates the differences among types of disposition in the time from complaint to disposition. Just over one-fourth of the cases that settled before an award was filed (27%) were resolved within 9 months of the complaint. Clearly, cases assigned to arbitration, even those that settled before an award, did not conclude “early.” A majority of the cases that were resolved without appeal were concluded within 18 months (548 days) of the complaint, whereas fewer than half of cases that appealed were resolved within that length of time.

<b>Cumulative Percentage of Cases Concluded, Cases Assigned to Arbitration, By Disposition</b>						
<b>Number of Days from Complaint to Final Disposition</b>	<b>All Cases (n = 201)</b>	<b>Settled Before Award (n = 106)</b>	<b>Award (n = 52)</b>	<b>Settled After Award, Before Appeal (n = 10)</b>	<b>Settled After Appeal (n = 29)</b>	<b>Trial Judgment (n = 4)</b>
180 or fewer days	7%	9%	8%	0	0	0
181 - 270 days	21%	27%	17%	20%	7%	0
271 - 365 days	38%	47%	38%	30%	10%	0
366 - 548 days	77%	85%	89%	70%	41%	0
549 - 730 days	90%	96%	94%	80%	62%	75%
more than 730 days	100%	100%	100%	100%	100%	100%

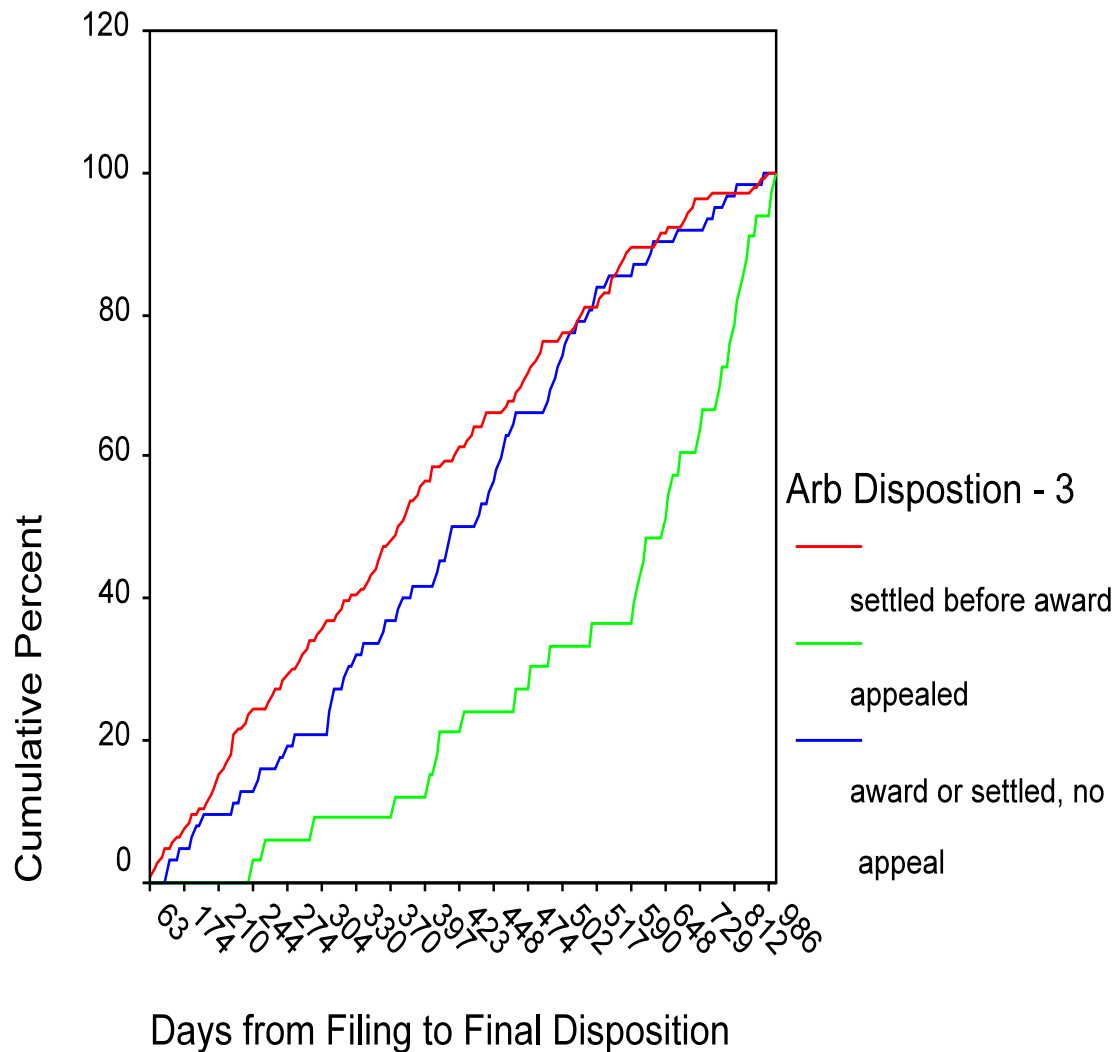
The deadline for filing an appeal is 20 days after the award is filed,<sup>155</sup> and the deadline for completing discovery is 80 days thereafter.<sup>156</sup> Among cases in which an appeal was filed, the length of time between the award and the final disposition (settlement or judgment) ranged from 30 to 532 days and averaged 185 days.

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<sup>155</sup> Ariz. R. Civ. P. 76(a).

<sup>156</sup> Ariz. R. Civ. P. 76(g)(3). The court, however, may extend the time for discovery for good cause. Ariz. R. Civ. P. 76(g)(4).

The following graph further illustrates the differences by type of disposition in the time from the complaint to final disposition for cases assigned to arbitration. In addition, it shows the wide range in the length of time from the complaint to final disposition, even for cases that settled before an award was filed or that were concluded by the award.



## **h. Timing of Pre-Award Settlements**

In the preceding section, we noted the long time from complaint to disposition for cases assigned to arbitration that settled before an award was filed. We attempted to explore when these cases settled in relation to other arbitration events.

Unfortunately, we were not able to reliably determine when cases settled in relation to the scheduled hearing date.<sup>157</sup> Of the 106 cases assigned to arbitration that settled before an award was filed, 97% did not have a hearing date listed in the docket file. We cannot conclude, however, that this means that such a large percentage of cases assigned to arbitration settled before a hearing was scheduled, because the hearing date also was missing in some cases in which an award was filed and, thus, in which a hearing was held. Accordingly, we were not able to determine from the docket data whether cases settled long in advance of, or shortly before, the hearing date.<sup>158</sup>

In order to examine the timing of settlement within the arbitration process, the appointment of the arbitrator was the only arbitration event available for all cases assigned to arbitration that settled before an award. It is not that we would expect arbitrator appointment to be a stimulus to settlement, but rather that we can use the data of the time from the final arbitrator appointment to the scheduled hearing date as a rough proxy of when hearings typically took place.

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<sup>157</sup> See *supra* Section III.B.3.e.

<sup>158</sup> In the survey of Pima County attorneys, among those who had recently represented a client in arbitration in a case that settled before the hearing, 33% said the case settled before a hearing date was set, 28% said it settled more than one month before the hearing, and 39% said it settled within a month of the hearing. See *infra* Section IV.B.2. We do not know whether the survey findings are representative of all cases, as it is possible that when asked to recall their most recent case in arbitration, attorneys focused on cases that went farther in the arbitration process.

As the following table shows, among cases assigned to arbitration that settled before an award, the cumulative percentage of cases that settled at each interval roughly paralleled the cumulative percentage of cases with hearings scheduled for that interval.<sup>159</sup> While any conclusions drawn from this rough comparison are only tentative, this would seem to suggest that most of the cases assigned to arbitration tended to settle roughly on par with when hearings were scheduled to occur.

<b>Days from Final Arbitrator Appointment to Settlement, Cases Assigned to Arbitration that Settled Before Award</b> (n =106)		
Days from Arbitrator Appointment to Settlement	Percentage of Cases	Cumulative Percent
90 or fewer days	21%	21%
91 - 120 days	22%	43%
121 - 180 days	22%	65%
181 - 270 days	25%	87%
more than 270 days	13%	100%

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<sup>159</sup> See *supra* Section III.B.3.e.

## **C. Arbitration Caseload and Disposition Statistics for All Arizona Counties**

This subsection of the report describes the performance of court-connected arbitration in all counties. This information is based on data the courts routinely report to the Administrative Office of the Courts, as well as on additional information we obtained from the courts. These statistics reflect only cases *assigned* to arbitration,<sup>160</sup> not all cases certified as “subject to arbitration.”

At several points in this subsection, we make comparisons across the counties to explore whether patterns in the caseload and disposition statistics correspond to differences in the counties’ practices regarding case assignment and arbitrator service.<sup>161</sup> These are only rough comparisons, however, as each statistic reflects the effects of a constellation of practices and factors, some of which are undoubtedly related to the courts’ general case processing rather than to their arbitration procedures.

### **1. Arbitration Caseload Statistics**

The table on page III.C-4, *infra*, provides basic caseload statistics for civil case filings and assignment to arbitration. Based on Superior Court caseload statistics for fiscal year 2003,<sup>162</sup> the table lists the total number of civil cases filed, as well as the number of cases filed in selected case categories. The table also lists the number of civil trials commenced, which includes arbitration appeals that proceeded to trial *de novo*. Based on information provided by the courts, the table indicates the number of cases

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<sup>160</sup> The courts report monthly to the Administrative Office of the Courts the number of “cases filed for arbitration,” defined as the “number of cases assigned to arbitration during the month.” See Arizona Supreme Court Administrative Office of the Courts, Research/Statistics Unit, *Instructions for Completing the Superior Court Monthly Statistical Report*, 5 (June 1996).

<sup>161</sup> See *supra* Section II.B for a description of which county follows which practices.

<sup>162</sup> For most counties, the patterns in 2003 were similar to those in 2002 or 2004; a few differences are noted *infra*. See FY2002, FY2003, and FY2004 Data Reports, Superior Court Case Activity, Arizona Supreme Court, Court Programs Unit, Research and Statistics, available online at <http://www.supreme.state.az.us/stats>.

assigned to arbitration.<sup>163</sup> In addition, the table lists the percentage of the total civil caseload and the percentage of the subset of tort and contract claims that cases assigned to arbitration represent.

As the table shows, in 2003, cases assigned to arbitration represented seven percent or less of all civil cases filed in a majority of counties. In three counties – Navajo, Pima, and Maricopa – cases assigned to arbitration represented 10% to 14% of all civil cases filed.<sup>164</sup> There was no consistent pattern of differences in the proportion of cases assigned to arbitration between counties that assigned cases after the answer was filed and counties that assigned cases after the motion to set was filed.<sup>165</sup>

Three case types – tort motor vehicle, tort non-motor vehicle, and contract cases – accounted for the majority of cases assigned to arbitration in all counties and for more than 85% of cases assigned to arbitration in all but two counties.<sup>166</sup> By contrast, non-classified civil cases (*e.g.*, petitions for name change, domestication of foreign judgment, forfeiture, forcible detainer, quiet title) typically were not subject, and seldom were assigned, to arbitration. In addition, it seems likely that tort and contract cases would consume more judicial resources than would non-classified civil cases. Accordingly, it may be more meaningful to examine the proportion of the tort and contract caseload that arbitration handles, rather than the proportion of the total civil caseload, in order to assess the arbitration program’s potential effect on the courts’ workload.

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<sup>163</sup> We used the court-provided data for the arbitration statistics because there were problems with the reporting software that led the Supreme Court report to show no cases assigned to arbitration in some counties that actually had arbitration cases. The statistics for Maricopa and Pima Counties were based on information those courts provided, as reported in earlier sections of the report. *See supra* Sections III.A.3, II.B.2. The statistics for the other counties were obtained in response to a brief questionnaire sent to each court. The authors thank the following court personnel for providing this information: Kip Anderson, Shelly Bacon, Michael Burke, Elaine DeBow, Anita Escobedo, Kristi Ferguson, Dolly Leglum, Jane Pray, Marla Myers, Barb Shaffer, Monica Stauffer, Grace Wiggins. Two staff members commented that the arbitration section of the PAM Module of AZTEC needs to be modified to match Ariz. R. Civ. Pro. 72-76 so that the program can be used.

<sup>164</sup> In Mohave County, the percentage of civil cases assigned to arbitration doubled in FY2004. In Navajo County, the percentage of cases assigned to arbitration was substantially greater in 2003 than in either the prior or subsequent year. And in Yuma County, the percentage of cases assigned to arbitration was substantially smaller in 2003 than in either the prior or subsequent year. *See Data Reports, supra* note 160.

<sup>165</sup> See the table at the end of Section II, *supra*, for a summary of the differences among the counties in practices concerning case assignment and arbitrator service.

<sup>166</sup> For details on the composition of cases assigned to arbitration in Maricopa and Pima Counties, *see supra* Sections III.A.3, III.B.2.



In a majority of the counties, cases assigned to arbitration represented from four percent to twelve percent of filed tort motor vehicle, tort non-motor vehicle, and contract cases. Cases assigned to arbitration represented 18% of filed tort motor vehicle, tort non-motor vehicle, and contract cases in Yuma County, and 24% and 25% of those cases in Pima and Maricopa Counties, respectively.<sup>167</sup>

One must bear in mind, however, that the caseload statistics discussed here are based on cases still active at the time of *assignment* to arbitration; the proportion of the civil caseload *subject* to arbitration would be considerably larger. The number of cases subject to arbitration was available only in Maricopa County, where they represented 42% of all filed civil cases and 81% of filed tort and contract cases. Most cases subject but not assigned to arbitration, however, appeared to conclude with little or no court involvement.<sup>168</sup>

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<sup>167</sup> In Mohave County in FY2004, the percentage of these cases assigned to arbitration doubled to 23%. In Yuma County in FY2004, the percentage of these cases assigned to arbitration increased to 27%. See FY2004 Data Report, *supra* note 160.

<sup>168</sup> See *supra* Section III.A.1.

County	Civil Filings and Arbitration Caseload Statistics, 2003, By County <sup>169</sup>						
	Total civil cases filed	TMV, TNMV, & contract cases filed	Non-classified civil cases filed	Total civil trials	Cases assigned to arbitration	% of all civil cases assigned to arbitration	% of TMV, TNMV, & contract cases assigned to arbitration
Apache	170	51	116	1	not available	—	—
Cochise	754	267	475	13	32	4%	9%
Coconino	701	317	366	5	46	7%	12%
Gila	311	164	124	27	11	4%	6%
Graham	157	63	89	5	0	n/a	n/a
Greenlee	38	13	19	0	0	n/a	n/a
LaPaz	239	77	159	5	3	1%	4%
Maricopa	35,956	18,716	16,042	350	4,920	14%	25%
Mohave	909	507	328	19	68	7%	11%
Navajo	324	212	101	13	32	10%	not available
Pima	6,934	3,656	2,992	149	908	13%	24%
Pinal	1,370	438	893	7	38	3%	5%
Santa Cruz	500	131	366	97	0	n/a	n/a
Yavapai	1,372	751	698	25	38	3%	5%
Yuma	976	347	621	13	66	7%	18%

*Note: TMV = tort motor vehicle; TNMV = tort non-motor vehicle; medical malpractice cases are a separate category. "Non-classified civil cases" include petitions for name change, domestication of foreign judgment, forfeiture, forcible detainer, and quiet title.*

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<sup>169</sup> The information on case filings and trials commenced is based on the FY2003 Data Reports, Superior Court Case Activity, Arizona Supreme Court, Court Programs Unit, Research and Statistics, available online at <http://www.supreme.state.az.us/stats>. The information on cases assigned to arbitration in Fiscal Year 2003 was provided by the courts. The arbitration data in Maricopa and Pima Counties are based on cases assigned to arbitration that concluded in calendar year 2003.

## **2. Disposition of Cases Assigned to Arbitration**

The following table provides more details on how cases *assigned* to arbitration were processed within the arbitration program. The statistics for Maricopa and Pima Counties were based on information those courts provided; the statistics for the other counties were obtained in response to a brief questionnaire sent to each court.<sup>170</sup> The table lists the number of cases assigned to arbitration, the number of arbitration awards filed, the number of appeals filed, and the number of trials in appealed cases. The table also indicates, where available, the median number of days from the complaint to final disposition for tort motor vehicle, tort non-motor vehicle, and contract cases assigned to arbitration.<sup>171</sup>

Based on data provided by the courts, an arbitration award was filed in a majority of counties in 31% to 63% of the cases assigned to arbitration. Specifically in Maricopa and Pima Counties, awards were filed in 43% and 42%, respectively, of cases assigned to arbitration.<sup>172</sup> Of course, the rate of awards would be far lower if it were calculated based on cases *subject* to arbitration rather than on the subset of cases *assigned* to arbitration. To illustrate this point using data from Maricopa County, an award was filed in 12% of tort and contract cases *subject* to arbitration, compared to 43% of tort and contract cases *assigned* to arbitration.<sup>173</sup>

It is not clear why an award was filed in such a sizeable proportion of cases assigned to arbitration. By comparison to the above hearing rates, the trial rate for all civil cases ranged from zero to 4% in most counties.<sup>174</sup> And the approximate trial rate for the subset of case types primarily assigned to arbitration (*i.e.*, tort motor vehicle, tort non-

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<sup>170</sup> See *supra* note 161.

<sup>171</sup> The median is the 50<sup>th</sup> percentile, or the number of days at which half the cases had less time pass between the complaint and final disposition and half had more time.

<sup>172</sup> In a sample of cases assigned to arbitration that consisted of a subset of the case types and dispositions included in the courts' database, but for which we were able to assign more fine-grained disposition categories, an award was filed in 63% of cases in Maricopa County and 48% in Pima County. See *supra*, Sections III.A.4, III.B.3. In Maricopa County, the court data probably somewhat underestimate, and the sample data probably somewhat overestimate, the actual percentage of awards filed.

<sup>173</sup> See *supra* Section III.A.2.

<sup>174</sup> Two counties had a higher trial rate: Gila (9%) and Santa Cruz (19%). The number of trials commenced included trials *de novo* in arbitration cases. See *supra* Section III.C.1.

motor vehicle, and contract cases) ranged from zero to 8% in most counties.<sup>175</sup> Thus, even when calculated in different ways, a much larger proportion of arbitration cases had a hearing than non-arbitration cases had a trial.

There were no consistent patterns of differences in the proportion of cases in which an award was filed by whether the county assigned cases to arbitration after the answer versus after the motion to set, by whether arbitrator service was voluntary versus mandatory, or by whether arbitrators were assigned to cases according to their subject matter expertise.

The arbitration award was appealed in 17% to 46% of cases in which an award was filed, and specifically in 22% of cases in both Maricopa and Pima Counties.<sup>176</sup> There were no consistent patterns of differences in the proportion of cases in which an appeal was filed by whether arbitrators were assigned to cases according to subject matter expertise or by whether arbitrator service was voluntary versus mandatory. In fact, some counties with mandatory arbitrator service had among the lowest appeal rates, while some counties that relied primarily on volunteer arbitrators had among the highest appeal rates.

Only a small proportion of arbitration cases in which an appeal was filed proceeded to trial. In four counties, none of the appealed cases went to trial; in another four counties (including Maricopa County), 14% to 19% of appealed cases went to trial; and in one county (Yavapai), 27% of appealed cases went to trial. When calculated as the proportion of cases *assigned* to arbitration that went to trial, the trial rate was less than 4% in every county except one, Yavapai, where it was 8%.<sup>177</sup>

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<sup>175</sup> These approximations were derived by dividing the number of trials by the number of tort and contract cases filed; the available data on the number of trials did not indicate the case type.

<sup>176</sup> In a sample of cases assigned to arbitration that consisted of a subset of the case types and dispositions included in the courts' database, but for which we were able to assign more fine-grained disposition categories, the appeal rate was 39% in Maricopa County and 37% in Pima County. *See supra*, Sections III.A.4, III.B.3. For Maricopa County, the court data probably somewhat underestimate, and the sample data probably somewhat overestimate, the actual appeal rate. For Pima County, it is not clear whether the sample data or the court data are more accurate.

<sup>177</sup> *See supra* Section III.A.2 for the trial rate of tort and contract cases *subject* to arbitration.

County	Statistics on Cases Assigned to Arbitration, 2003, By County <sup>178</sup>						
	# cases assigned to arbitration	# arb awards filed	% arb cases with arb award filed	# appeals filed in arb cases	% arb awards appealed	# trials in arb appeals	median # of days from complaint to disposition in cases assigned to arb <sup>179</sup>
Apache	not available	- -	- -	- -	- -	- -	- -
Cochise	32	10	31%	3	30%	0	341
Coconino	46	16	35%	7	44%	1	336
Gila	11	6	55%	1	17%	not available	670
Graham	no program	- -	- -	- -	- -	- -	- -
Greenlee	no program	- -	- -	- -	- -	- -	- -
La Paz	3	3	100%	1	33%	0	166
Maricopa	4,920	2,118	43%	460	22%	89	311
Mohave	68	14	21%	4	29%	0	not available
Navajo	32	not available	N/A	4	N/A	0	not available
Pima	908	380	42%	84	22%	not available	419 <sup>180</sup>
Pinal	38	18	47%	6	33%	1	154
Santa Cruz	no program	- -	- -	- -	- -	- -	- -
Yavapai	38	24	63%	11	46%	3	204
Yuma	66	28	42%	7	25%	1	not available

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<sup>178</sup> This information was provided by the courts. Graham County implemented a new program in 2004.

<sup>179</sup> These figures include only the three main case types: contracts, tort motor vehicle, and tort non-motor vehicle cases. These figures are for cases *assigned* to arbitration; for timing data for cases *subject* to arbitration in Maricopa and Pima Counties, *see supra* Sections III.A.2 and III.B.1.

<sup>180</sup> This figure is based on a sample of cases assigned to arbitration that included only selected disposition types, and thus is probably higher relative to the other counties. *See supra* Section III.B.3.

The arbitration programs did not seem to achieve the goal of resolving cases quickly. In three of the eight counties for which time to disposition data were available, half of the cases assigned to arbitration concluded within five to seven months of the complaint. In four of the counties, including Maricopa and Pima Counties, half of the cases assigned to arbitration concluded within ten to fourteen months of the complaint. And in one county, Gila, half of the cases assigned to arbitration concluded within twenty-two months of the complaint.

Counties that assigned cases to arbitration after the motion to set was filed tended to have longer median times from complaint to disposition (341, 419, and 670 days) than did counties that assigned cases to arbitration after the answer was filed (154, 166, and 311 days), with counties that assigned cases at an intermediate time having an intermediate median time from complaint to disposition (204 and 336 days). This would seem to suggest that assigning cases to arbitration after the answer is filed or at an early conference could produce faster resolutions than assigning cases to arbitration after the motion to set is filed. However, the fact that some counties that assigned cases to arbitration later had relatively short times from the complaint to disposition (*e.g.*, 341 days), while some counties that assigned cases earlier had relatively long times from the complaint to disposition (*e.g.*, 311, 336 days), suggests that earlier assignment to arbitration might facilitate but does not guarantee faster resolutions.

The findings of some relationship between the timing of assignment to arbitration and the time from complaint to disposition, however, might be an artifact of analyzing timing data only for cases *assigned* to arbitration. Cases that conclude in the time period between the answer and the motion to set would not be included among cases assigned to arbitration in counties in which assignment occurs after the motion to set, but would be included in counties in which assignment occurred after the answer. As a result of the differential inclusion of those cases, the time from complaint to disposition for cases assigned to arbitration is likely to appear longer in counties that assign cases after the motion to set, all else being equal.

## **D. Summary: The Performance of Arbitration in Arizona's Superior Courts**

Cases are designated as “subject to arbitration” or “not subject to arbitration” by the plaintiff on the certificate on compulsory arbitration filed with the complaint and by the defendant on the certificate filed with the answer. At a later point (ranging from after the answer is filed to after the motion to set is filed, depending on the county), cases designated as “subject to arbitration” that are still active are “assigned” to arbitration and an arbitrator is appointed. The courts typically collect and report statistics on “arbitration cases” only after cases have been assigned to arbitration; cases subject to arbitration that conclude before assignment generally are not tracked as part of the “arbitration” caseload but instead as part of the “non-arbitration” caseload.

Information regarding the number and types of cases assigned to arbitration, the progression of those cases through the arbitration process, and their average time to disposition was obtained from a questionnaire sent to each court. More detailed information on these issues, as well as on cases subject but not assigned to arbitration, the timing of arbitration events, and on the time to disposition for arbitration and non-arbitration cases was obtained in only Maricopa and Pima Counties from the courts' database, supplemented with information from several case samples.

Comparisons conducted across the counties to explore whether patterns in the caseload and disposition statistics correspond to differences in the counties' practices regarding case assignment and arbitrator service are only rough comparisons, as each statistic reflects the effects of a constellation of practices and factors, some of which are undoubtedly related to the courts' general case processing rather than to their arbitration procedures.

### **1. The Arbitration Caseload**

Information on cases *subject* to arbitration was available only for Maricopa County. Cases subject to arbitration comprised 42% of all filed civil cases. However, civil cases categorized as “non-classified” (e.g., petitions for name change, domestication of foreign judgment, forfeiture, forcible detainer, quiet title) typically were not subject and seldom were assigned to arbitration, although they made up a substantial proportion of the civil caseload. These non-classified civil cases seem likely to consume fewer judicial resources than would tort and contract cases. Accordingly, in assessing the arbitration program's potential effect on the courts' workload, it may be more meaningful

to examine the proportion of the tort and contract caseload subject to arbitration, rather than the proportion of the total civil caseload. Cases subject to arbitration comprised 81% of the three primary case types: contract, tort motor vehicle, and tort non-motor vehicle cases. Using either calculation, cases *subject* to arbitration accounted for a substantial portion of civil cases.

Not all cases subject to arbitration, however, are likely to affect the workload of the courts or the arbitration programs. Approximately two-thirds of cases subject to arbitration in Maricopa County concluded prior to assignment to arbitration, primarily by default judgment (36%), dismissal for lack of service or lack of prosecution (28%), or settlement (29%). Although information was not available on the extent of court involvement in these cases, it seems likely that most required little court time. Most contract cases subject to arbitration concluded prior to assignment to arbitration, but a majority of tort cases did not. Only approximately one-third of cases subject to arbitration were *assigned* to arbitration.

The number of cases per county that were *assigned* to arbitration in 2003 varied considerably, ranging from three cases in La Paz County to almost 5,000 cases in Maricopa County. Across the counties, however, cases assigned to arbitration comprised a similar, and relatively small, proportion of the overall civil caseload: less than 8% in most counties and less than 15% in all counties. Specifically in Maricopa and Pima Counties, cases assigned to arbitration comprised 14% and 13%, respectively, of the civil caseload. There was no consistent pattern of differences in the proportion of cases assigned to arbitration between counties that assigned cases after the answer was filed and counties that assigned cases after the motion to set was filed.

Three case types – tort motor vehicle, tort non-motor vehicle, and contract cases – accounted for the majority of cases assigned to arbitration in all counties and for more than 85% of cases assigned to arbitration in all but two counties. In Maricopa and Pima Counties, for which more detailed information was available, tort motor vehicle cases alone comprised the majority of cases assigned to arbitration. By contrast, non-classified civil cases (*e.g.*, petitions for name change, domestication of foreign judgment, forfeiture, forcible detainer, quiet title) typically were not subject, and seldom were assigned, to arbitration.

Tort and contract cases seem likely to consume more judicial resources than would non-classified civil cases. Accordingly, in assessing the arbitration program's potential effect on the courts' workload, it may be more meaningful to examine the proportion of the tort and contract caseload assigned to arbitration, rather than the proportion of the total civil caseload. Cases assigned to arbitration accounted for one-fourth of contract,



tort motor vehicle, and tort non-motor vehicle cases in Pima and Maricopa Counties, and 4% to 18% of tort and contract cases in the other counties.

## **2. Progression and Final Disposition of Cases Assigned to Arbitration**

Based on data provided by the courts, an award was filed in a sizeable proportion of cases assigned to arbitration – in 31% to 63% of cases – in most counties. Specifically in Maricopa and Pima Counties, an award was filed in 43% and 42%, respectively, of cases assigned to arbitration.<sup>181</sup> It is not clear why an award was filed in so many cases assigned to arbitration. As a basis of comparison, in most counties a trial was commenced in fewer than 5% of all civil cases and fewer than 9% of tort and contract cases.

There was no consistent pattern of differences in the proportion of cases in which an award was filed by whether counties assigned cases to arbitration earlier (after the answer was filed or at an early case management conference) versus later in the case (after the motion to set was filed). Nor were there consistent patterns of differences in the hearing rate by whether counties relied on voluntary versus mandatory arbitrator service or whether they assigned arbitrators to cases according to their subject matter expertise. And in both Maricopa and Pima Counties, there were no differences among the three main case types (tort motor vehicle, tort non-motor vehicle, and contract cases) in the likelihood that cases assigned to arbitration settled before an award was filed.

Based on data from the courts, the percentage of cases in which the arbitration award was appealed ranged from 17% to 46%, and specifically was 22% in both Maricopa and Pima Counties.<sup>182</sup> There was no consistent pattern of differences in the proportion of cases in which an appeal was filed by whether counties relied on voluntary or mandatory arbitrator service. In fact, some counties with mandatory arbitrator service

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<sup>181</sup> In a sample of cases assigned to arbitration that consisted of a subset of the case types and dispositions included in the courts' database, but for which we were able to assign more fine-grained disposition categories, an award was filed in 63% of cases in Maricopa County and 48% in Pima County. In Maricopa County, the court data probably somewhat underestimate, and the sample data probably somewhat overestimate, the actual percentage of awards filed.

<sup>182</sup> In a sample of cases assigned to arbitration that consisted of a subset of the case types and dispositions included in the courts' database, but for which we were able to assign more fine-grained disposition categories, the award was appealed 39% of cases in Maricopa County and 37% in Pima County. In Maricopa County, the court data probably somewhat underestimate, and the sample data probably somewhat overestimate, the actual percentage of appeals filed; in Pima County, it is not clear whether the sample data or the court data are more accurate.

had among the lowest appeal rates, whereas some counties that relied primarily on volunteer arbitrators had among the highest appeal rates. Nor was there a consistent pattern of differences in the proportion of cases in which an appeal was filed by whether the county assigned arbitrators to cases according to subject matter expertise. And in both Maricopa and Pima Counties, there were no differences among the three main case types (tort motor vehicle, tort non-motor vehicle, and contract cases) in the likelihood that the award was appealed.

Only a small proportion of cases in which the award was appealed proceeded to trial. In four counties, none of the appealed cases went to trial. In another four counties, including Maricopa County, 14% to 19% of the appealed cases went to trial; only one county had a higher rate of trial on appeal (27%). When calculated instead as the proportion of cases *assigned* to arbitration that went to trial, the trial rate was less than 4% in every county except one, where it was 8%.

And if calculated as the proportion of cases *subject* to arbitration, the trial rate in arbitration cases would be even lower. We were able to directly compare the dispositions of tort and contract cases that were subject versus not subject to arbitration only in Maricopa County. For both groups of cases, the trial rate was 1%. Three percent of cases subject to arbitration were resolved by summary judgment or some other non-trial judgment or order, compared to 8% of cases not subject to arbitration. Thirty-nine percent of cases subject to arbitration settled, compared to 55% of cases not subject to arbitration. Twelve percent of the cases subject to arbitration were resolved by the arbitration award. These findings suggest that arbitration diverted cases from settlement, not trial, and might have diverted some cases from other types of judgments.

### **3. Time to Disposition**

Data permitting the comparison of the time to disposition for tort and contract cases subject to arbitration versus not subject to arbitration were obtained only for Maricopa and Pima Counties. Because of differences between the courts in their disposition codes and the form in which the data were available, the types of dispositions included in these analyses in each county were somewhat different. Nonetheless, using a sample of tort and contract cases in both counties, cases subject to arbitration were resolved more quickly (on average, by three to five months) than were cases not subject to arbitration. However, because of differences in the amount in controversy between cases subject versus not subject to arbitration, and the likely associated differences in case complexity and the amount of discovery, the faster resolution of cases subject to arbitration can not necessarily be attributed to the arbitration process.

The seemingly faster resolution of cases subject to arbitration does not mean that those cases were resolved quickly. In fact, tort and contract cases subject to arbitration did not meet the case processing time standards set by the Arizona Supreme Court. In Maricopa County, where data were available for most disposition types, 56% of cases subject to arbitration were resolved within nine months, compared to the standard specifying that 90% of cases should be resolved within that time period.

Of course, for the subset of cases *assigned* to arbitration, the time to disposition was longer than for all cases subject to arbitration. In three of the eight counties for which time to disposition data were available, half of the cases assigned to arbitration concluded within five to seven months of the complaint. In four counties, including Maricopa and Pima Counties, half of the cases assigned to arbitration concluded within ten to fourteen months of the complaint. And in one county, half of the cases assigned to arbitration concluded within twenty-two months of the complaint. Assigning cases to arbitration after the answer was filed was often, but not always, associated with a shorter average time to disposition than later assignment. The findings of some relationship between the timing of assignment to arbitration and the time from complaint to disposition, however, might be an artifact of analyzing timing data only for cases *assigned* to arbitration.

In Maricopa and Pima Counties, more detailed information was available on the time to disposition for a sample of cases assigned to arbitration. In Maricopa County, 60% of cases assigned to arbitration concluded within one year of the complaint, 85% concluded within 18 months, and 94% concluded within two years. In Pima County, 38% of cases assigned to arbitration concluded within one year of the complaint, 77% concluded within 18 months, and 90% concluded within two years.

For these two counties, differences in the time to disposition of cases that concluded at different points in the arbitration process also were examined. In Maricopa County, cases assigned to arbitration that settled before an award was filed concluded, on average, about two months faster than cases resolved by the award. In Pima County, however, there was no difference in the time to disposition for these two groups of cases. Although the information in the case docket did not permit a systematic examination, in both counties most of the cases that settled tended to do so in unison with when hearings were scheduled. This pattern suggests that the hearing provided the event that stimulated settlement. Twenty-two percent of cases in Maricopa County settled within two months of the arbitrator's appointment; however, only 9% of cases in Pima County settled within that time period. Because the arbitrator is appointed much later in Pima County, this difference suggests that it was the stage of the litigation, rather than the appointment of the arbitrator, that produced the initial burst of settlement in Maricopa County.

In both counties, cases that were resolved by the filing of the arbitration award did not conclude faster than cases that settled after the award was filed but prior to appeal. However, in both counties, cases in which an award was filed and not appealed concluded six to eight months faster than cases in which the award was appealed and ultimately either settled or tried. In Maricopa County, for instance, cases that were resolved by the award concluded, on average, within 344 days of the complaint, compared to within 565 days for cases that settled after appeal. In Pima County, cases that were resolved by the award concluded, on average, within 416 days of the complaint, compared to within 642 days for cases that settled after appeal.

The longer-than-expected time to disposition for arbitration cases prompted a detailed examination of the progression of cases through the arbitration process and the length of time between the various arbitration events.

#### **4. Time Between Arbitration Events**

To examine arbitration case processing in more detail, the length of time between various arbitration events was obtained from the case docket in a sample of tort and contract cases assigned to arbitration in Maricopa and Pima Counties. In Maricopa County, filing the answer triggered assignment to arbitration, and that occurred 67 days, on average, after the complaint was filed. In Pima County, by comparison, filing the motion to set triggered assignment to arbitration, and that occurred 176 days, on average, after the complaint was filed.

The initial arbitrator was appointed, on average, within approximately 47 days of the event that triggered arbitration assignment in both counties. Approximately one-third of cases in both counties (29% in Maricopa County and 36% in Pima County) involved one or more re-appointments of the arbitrator. The similar rates of arbitrator re-appointment are interesting in light of differences between the counties in practices regarding arbitrator selection and assignment based on practice area. In cases that involved one or more arbitrator re-appointments, the average length of time between the first and final appointment of the arbitrator was 55 days in Maricopa County and 38 days in Pima County.

In all, the final appointment of the arbitrator took place, on average, within 129 days of filing the complaint in Maricopa County and within 238 days of filing the complaint in Pima County. This suggests, not surprisingly, that appointing the arbitrator after the answer (in Maricopa County) rather than after the motion to set (in Pima County) can start the arbitration process and its associated deadlines sooner.

After the arbitrator is appointed, the hearing is to take place within 120 days, unless the time frame is extended for good cause. The hearing was scheduled to take place by that deadline in under half of the cases in both counties (43% and 45%). These figures probably overestimate the number of hearings that took place within the 120-day deadline because arbitrators did not routinely file an amended notice of hearing when the hearing was rescheduled. In both counties, the hearing was scheduled to take place within 270 days of the final arbitrator appointment in 92% of cases. This similar pattern was observed, even though cases in Pima County had more time to conduct discovery prior to the appointment of the arbitrator. The case docket did not have sufficient information on continuances to examine what role they played in when the hearing took place.

The average length of time between the final arbitrator appointment and the scheduled hearing date was similar in the two counties (152 days and 148 days) despite differences in their practices. Maricopa County did not monitor the arbitrators' scheduling of the hearing, and requests for a continuance (other than to extend on the inactive calendar) were decided by the arbitrator. By contrast, the court in Pima County routinely sent a request for a status report if a hearing had not been held by the 120-day deadline, and requests for continuances were decided by a judge.

In Maricopa County, the scheduled hearing date was more than 270 days after the complaint in approximately half of the cases and more than 330 days after the complaint in approximately one-fourth of the cases. Thus, a motion to set the case for trial or to continue the case on the inactive calendar (which would require judicial involvement) must have been filed in a sizeable number of cases before the hearing was held. The issue of continuing the case on the inactive calendar did not apply in Pima County because a motion to set had to already be filed in every case in order to be assigned to arbitration. However, an even larger proportion of cases in Pima County, 62%, had a scheduled hearing date more than 330 days after the complaint.

After the hearing, the arbitrator is supposed to notify the parties of his or her decision in writing within 10 days. With the caveat that these data are likely to underestimate compliance with that deadline, particularly in Maricopa County, the notice of decision was filed within that time period in 43% of cases in Maricopa County and 60% of cases in Pima County. After the notice of decision, the award is to be filed within 25 days, and was filed within that time period in 63% of cases in Maricopa County and 81% of cases in Pima County. It is not clear whether the differences between the two counties in the apparent compliance with these deadlines reflected differences in their practices regarding arbitrator selection and assignment or in the data available in each county.

Overall, the award is to be filed within 145 days of the final arbitrator appointment. Only approximately 35% of awards in both counties were filed within this time frame. The award was filed, on average, within 191 days of the final arbitrator appointment in Maricopa County and within 199 days in Pima County. Most awards in both counties, 86% in Maricopa County and 83% in Pima County, were filed within 270 days of the final arbitrator appointment.

In sum, once cases were assigned to arbitration, the length of time between arbitration events was similar in Maricopa and Pima Counties. Thus, the longer time from complaint to final disposition observed in cases assigned to arbitration in Pima County versus Maricopa County appeared to be due largely to differences in the timing of the assignment of cases to arbitration (*i.e.*, after the motion to set versus after the answer, respectively).

## **IV. Lawyers' Views of Court-Connected Arbitration**

We first interviewed judges and court administrators involved in running their courts' arbitration programs regarding their views of the goals of court-connected arbitration and whether their program was accomplishing those goals. The responses were notable in their uniformity. All judges and administrators said their programs were intended to accomplish two things: (1) to provide litigants a more efficient and less expensive mechanism for resolving lawsuits in which the amount in controversy might not justify the costs associated with traditional litigation; and (2) to relieve court congestion and delay by freeing up judicial resources to be used in cases with more at stake. Moreover, the court personnel all agreed that their programs were successfully accomplishing these two objectives.

Subsequently, we surveyed State Bar members to ascertain their views of the court-connected arbitration program in their county. This section of the report describes in detail the survey findings regarding Arizona lawyers' views of arbitration.

The first subsection describes the survey procedure and the respondents. The second subsection reports the views of lawyers who had experience as counsel in arbitration, and the third subsection reports the views of lawyers who had experience as arbitrators. The fourth subsection presents lawyers' opinions about different aspects of the current structure of the arbitration program and about its effectiveness. The final subsection contains a summary of the findings.

The survey provided a number of opportunities for the lawyers to add comments or elaborate on their answers. Selected comments are included throughout this section to illustrate lawyers' views. All of the lawyers' comments are included in their entirety in Appendix B.

## A. Survey Procedure and Respondents

All members of the State Bar of Arizona were invited in June 2004 to participate in a web-based and e-mail survey about court-connected arbitration in Arizona.<sup>1</sup> Surveys were sent to 9,338 Bar members who had a valid e-mail address, and a response was received from 4,868 (a response rate of 52%). In order to obtain the most useful information, participation in the survey was limited via screening questions to lawyers who had direct experience with court-connected arbitration in Arizona. Of the lawyers who responded, 1,934 indicated they had no direct experience with the arbitration program. Substantive survey responses were obtained from 2,934 lawyers, or 31% of State Bar members with a valid e-mail address.<sup>2</sup> The proportion of lawyers responding from each of Arizona's fifteen counties was similar to the proportion of State Bar members in each county.

The survey consisted of three main sections: (1) questions about experience as counsel in a recent case assigned to arbitration, (2) questions about experience as an arbitrator recently appointed to a case, and (3) questions seeking general views of court-connected arbitration. Thus, a given lawyer could be in a position to answer one, two, or all three sections of the questionnaire.<sup>3</sup>

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<sup>1</sup> The survey was preceded by an e-mail from State Bar President Charles Wirken that included a request for participation from Chief Justice Jones. The authors thank the State Bar of Arizona for providing the names and e-mail addresses of State Bar members. The initial request for participation provided a web site to which lawyers were directed to complete the survey. Due to difficulties some respondents had in accessing that survey version, a second request was sent that included a version of the survey that could be completed and returned via e-mail. A few lawyers who were unable to complete the questionnaire by web or e-mail either mailed their questionnaire or were interviewed by telephone. Follow-up e-mails were sent to those who had not responded to earlier requests. The authors thank Bill Edwards and the Arizona State University Survey Research Laboratory for administering the survey and compiling the responses. A copy of the survey and requests for participation are included in Appendix B.

<sup>2</sup> If we assume that an equal proportion of non-respondents lacked direct experience with arbitration as was observed among survey respondents, that would mean that substantive survey responses were obtained from 52% of the subset of State Bar members with arbitration experience.

<sup>3</sup> Within a given section of the survey, some lawyers did not answer every question. In addition, we excluded some responses when it was clear that the respondent had not followed the survey instructions (*e.g.*, gave multiple answers to a single question in reference to multiple cases; answered in reference to arbitration other than court-connected arbitration in a Superior Court in Arizona; answered questions requiring direct experience but indicated they had none). The number of responses to each question (n) is noted in the tables.



A total of 905 lawyers responded to the section of the survey about their experience as counsel in arbitration. Of these, 72% (648) practiced primarily in Maricopa County, 14% (127) practiced primarily in Pima County, 6% (53) practiced primarily in the other thirteen counties, and 8% (77) did not identify a county.

A total of 2,016 lawyers responded to the section of the survey about their experience as an arbitrator. Of these, 81% (1,636) practiced primarily in Maricopa County, 9% (190) practiced primarily in Pima County, 5% (95) practiced primarily in the other thirteen counties, and 5% (95) did not identify a county.

County	Number of Respondents to Each Survey Section, By County		
	Represented Client in Arbitration	Appointed as Arbitrator	Direct Experience with Arbitration
Apache	0	0	1
Cochise	10	18	30
Coconino	8	15	28
Gila	1	5	5
Graham	1	2	3
Greenlee	0	0	0
La Paz	1	1	2
Maricopa	648	1636	2007
Mohave	8	10	18
Navajo	1	4	8
Pima	127	190	268
Pinal	2	16	18
Santa Cruz	1	0	3
Yavapai	6	9	16
Yuma	14	15	27
not specified	77	95	81
Total	905	2016	2515

A total of 2,515 lawyers responded to the section of the survey seeking their general views about arbitration based on their overall experience. Of these, 80% (2,007) practiced primarily in Maricopa County, 11% (268) practiced primarily in Pima County,

6% (159) practiced primarily in the other thirteen counties, and 3% (81) did not identify a county.

There were a relatively small number of respondents in each of the thirteen counties outside Maricopa and Pima Counties. This reflects the absence of an arbitration program in several counties and the small number of cases assigned to arbitration in many of the counties.<sup>4</sup> Because the number of respondents in these counties was too small to produce meaningful results in statistical analyses for each individual county, we report the responses combined across these counties. The “statewide total” reported in each table includes lawyers who did not identify a county.

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<sup>4</sup> *See supra* section III.C.

## **B. Lawyers' Experience as Counsel in Arbitration**

The first section of the survey was directed at lawyers' experience representing a client in Arizona's mandatory court-connected arbitration program. The lawyers were instructed to answer the questions with regard to their most recent completed case that had been assigned to arbitration within the preceding two years. Experience was limited to the preceding two years so that responses would be based on the arbitration program as it currently is configured and operating. Focusing on a particular case has been shown to produce more accurate information than responses based on general experience across a number of cases.<sup>5</sup> A total of 905 lawyers responded to this section of the survey.

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<sup>5</sup> In addition, this single-case approach produces more meaningful relationships among the different questions to permit a more reliable analysis of, for instance, what factors were associated with the decision to appeal the award. The full gamut of case experiences is covered across respondents rather than by each respondent.

## **1. Respondents to This Section of the Survey**

Of the lawyers who responded to this section of the survey, approximately half said that less than 25% of their caseload was subject to court-connected arbitration and approximately half said that 25% or more of their caseload was subject to arbitration.<sup>6</sup> Thus, a sizeable number of the lawyers who gave their views were likely to have had a substantial amount of experience as counsel in arbitration. In addition, approximately two-thirds of the lawyers who had recently served as counsel also had served as an arbitrator in the preceding two years.

<b>Percentage of Caseload Subject to Arbitration</b>	<b>Maricopa (<i>n</i> = 626)</b>	<b>Pima (<i>n</i> = 123)</b>	<b>Other Counties (<i>n</i> = 50)</b>	<b>Statewide Total (<i>n</i> = 805)</b>
less than 10%	28%	26%	22%	28%
10% - 24%	31%	36%	40%	32%
25% - 49%	19%	14%	22%	28%
50% or more	22%	24%	16%	22%

There were no statistically significant relationships between the percentage of the lawyers' caseload that was subject to arbitration and their assessments of the arbitration process, the award, or the arbitrator. Nor was the proportion of the lawyers' caseload subject to arbitration related to the number of continuances granted or to whether the award was appealed. The percentage of the lawyers' caseload subject to arbitration was related, however, to whether the lawyer struck an arbitrator, with lawyers who had more cases subject to arbitration being more likely to strike an arbitrator.<sup>7</sup>

Next, we examined the survey respondents' primary area of law practice. To make comparisons among the large number of practice areas more manageable, we reduced them to three general categories of practice. We classified each practice area into one of these three categories based on the average proportion of the lawyers' caseload that was

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<sup>6</sup> There were no statistically significant differences among the counties ( $F(2, 781) = .535, p = .586$ ). To determine whether apparent differences between groups of cases (here, the counties) were "true" differences (*i.e.*, statistically significant differences) or merely reflected chance variation, tests of statistical significance were conducted. The conventional level of probability for determining the statistical significance of findings is the .05 level (*i.e.*,  $p < .05$ ). RICHARD P. RUNYON & AUDREY HABER, FUNDAMENTALS OF BEHAVIORAL STATISTICS at 229-31 (5<sup>th</sup> ed. 1984).

<sup>7</sup>  $r(788) = .123, p < .01$ .

subject to arbitration.<sup>8</sup> Accordingly, this new categorization reflected civil litigation and procedural expertise as well as subject matter expertise. Lawyers who had not specified a practice area were not included in this measure.

The first category included lawyers in practice areas that had the largest proportion of their caseload (81% to 89%) subject to arbitration. The practice areas in this category, which we labeled “civil litigation,” were general civil litigation, tort or personal injury, and business or commercial litigation. The second category included lawyers in practice areas that had the smallest proportion of their caseload (18% to 46%) subject to arbitration. The practice areas in this category, which we labeled “transactional/criminal,” were tax, criminal, transactional, Workers’ Compensation, real estate, and probate, estate and trust. The third category included lawyers in practice areas that had an intermediate proportion of their caseload (56% to 59%) subject to arbitration. The practice areas in this category, which we labeled “mixed,” were family, bankruptcy, and labor and employment.

The largest proportion of lawyers who responded to this section of the survey, a majority in Maricopa and Pima Counties and almost half in the other counties, had primarily a civil litigation practice. A larger proportion of lawyers in Pima and Maricopa Counties had a civil litigation practice, and a smaller proportion had a transactional/criminal practice, than did lawyers in the other counties.<sup>9</sup>

<b>General Area of Practice</b>	<b>Maricopa (<i>n</i> = 598)</b>	<b>Pima (<i>n</i> = 124)</b>	<b>Other Counties (<i>n</i> = 51)</b>	<b>Statewide Total (<i>n</i> = 777)</b>
civil litigation	78.1%	71.8%	49.0%	75.0%
mixed	11.0%	7.3%	19.6%	11.1%
transactional/criminal	10.9%	21.0%	31.4%	13.9%

There were no statistically significant differences among lawyers in these three general areas of practice in their assessments of the arbitration process, the award, or the arbitrator. Accordingly, any differences among the counties in counsels’ views of arbitration were not likely the result of differences among the counties in the survey respondents’ area of law practice. Practice area also was not related to the number of

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<sup>8</sup> This was based on all lawyers who responded to the survey, not just those who responded to this section pertaining to counsel in arbitration.

<sup>9</sup>  $F(2, 758) = 3.92, p < .05$ .

continuances granted or to whether the award was appealed. Practice area was related, however, to whether the lawyer struck an arbitrator, with lawyers in civil litigation practice being more likely to strike an arbitrator than other lawyers.<sup>10</sup>

A majority of the lawyers who responded to this section of the survey had a solo or small firm practice. A smaller proportion of lawyers in Maricopa and Pima Counties had a small firm practice, and a larger proportion had a medium or large firm practice, than did lawyers in the other counties.<sup>11</sup>

Type of Practice	Maricopa (n = 644)	Pima (n = 125)	Other Counties (n = 52)	Statewide Total (n = 826)
solo	26.2%	35.2%	32.7%	28.0%
small firm	34.5%	35.2%	59.6%	36.2%
medium firm	19.7%	20.0%	5.8%	18.9%
large firm	13.7%	7.2%	0%	11.9%
corporate counsel	3.6%	1.6%	0%	3.0%
government / agency	2.0%	.8%	1.9%	1.9%
other	.3%	0%	0%	.2%

There were no statistically significant differences by type of practice in lawyers' assessments of the arbitration process, the award, or the arbitrator. Accordingly, any differences among the counties in counsels' views of arbitration were not likely the result of differences among the counties in the survey respondents' type of practice. The type of practice also was not related to the number of continuances granted or to whether the award was appealed. The type of practice was related, however, to whether the lawyer struck an arbitrator, with lawyers in solo or government/agency practice being less likely to strike an arbitrator than lawyers in other types of practice.<sup>12</sup>

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<sup>10</sup>  $\chi^2(2) = 7.80, p < .05$ .

<sup>11</sup>  $\chi^2(12) = 31.63, p < .01$ .

<sup>12</sup>  $\chi^2(6) = 18.81, p < .01$ .

Over half of the lawyers responded to this section of the survey from the perspective of representing the plaintiff in their most recent case assigned to arbitration.<sup>13</sup> A larger proportion of respondents in Pima County than in Maricopa County and the other counties had represented the plaintiff.<sup>14</sup>

<b>Party Represented</b>	Maricopa ( <i>n</i> = 640)	Pima ( <i>n</i> = 126)	Other Counties ( <i>n</i> = 52)	Statewide Total ( <i>n</i> = 895)
plaintiff	52.7%	65.1%	59.6%	54.9%
defendant	46.7%	33.3%	40.4%	44.5%
other	.6%	1.6%	0%	.7%

Plaintiffs' lawyers had more favorable views than defense lawyers on a number of assessments of the arbitration process, the arbitrator, and the award. Lawyers who represented a plaintiff were more likely than those who represented a defendant to think the hearing process was very fair (56% vs. 43%), the arbitrator understood the issues very well (59% vs. 48%), the award was very or somewhat fair (75% vs. 62%), and the award was about the same as the expected trial judgment (60% vs. 45%).<sup>15</sup> However, lawyers who represented a plaintiff were *less* likely than those who represented a defendant to say that the other side participated in good faith during the hearing (75% vs. 91%).<sup>16</sup>

As a result of the larger proportion of plaintiffs' counsel among the lawyers in Pima County who responded to this section of the survey, Pima County lawyers' views reported here might be more favorable than if they had been based on a more even mix of plaintiff and defense counsel. In addition, this disproportionate representation of plaintiffs' counsel played a large role in, but did not entirely explain, the more favorable views that Pima County counsel had compared to counsel in other counties.<sup>17</sup>

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<sup>13</sup> "Other" included counter-defendants and third-party plaintiffs.

<sup>14</sup>  $\chi^2(2) = 7.34, p < .05$ .

<sup>15</sup> Hearing:  $F(1, 689) = 5.84, p < .05$ ; arbitrator:  $F(1, 690) = 8.68, p < .01$ ; award fairness:  $F(1, 635) = 6.82, p < .01$ ; award compared to judgment:  $\chi^2(2) = 15.01, p < .01$ .

<sup>16</sup>  $F(1, 687) = 33.06, p < .001$ .

<sup>17</sup> See *infra* Section IV.B.3.

Most of the lawyers who responded to this section of the survey were most recently involved in arbitration in a contract or tort motor vehicle case. Relatively few lawyers had been involved in a tort non-motor vehicle case.<sup>18</sup>

<b>Type of Case Represented</b>	Maricopa ( <i>n</i> = 646)	Pima ( <i>n</i> = 127)	Other Counties ( <i>n</i> = 52)	Statewide Total ( <i>n</i> = 902)
tort motor vehicle	37.2%	47.2%	32.7%	38.9%
tort non-motor vehicle	13.5%	14.2%	15.4%	13.4%
contract	45.5%	37.8%	46.2%	43.9%
other	3.9%	.8%	5.8%	3.8%

Compared to the composition of cases assigned to arbitration in the Maricopa and Pima County court data, a larger proportion of respondents to this section of the survey were involved in a contract case and a smaller proportion were involved in a tort motor vehicle case.<sup>19</sup> We speculate that this might reflect that a given lawyer who handles tort motor vehicle cases would appear more often in arbitration than a given lawyer who handles contract cases. As a result, a tort lawyer and a contract lawyer would each represent one response to the survey, but the tort lawyer would represent a greater number of cases in the arbitration caseload than would the contract lawyer. If this is not what explains these differences in case composition, then the survey respondents might not be representative of all counsel in arbitration.

Because lawyers representing clients in different types of cases did not differ in their assessments of the arbitration process, the award, or the arbitrator, it is not likely that case composition affected the findings. The only difference that did emerge was that more lawyers in tort motor vehicle cases than in contract cases gave as their reason for striking an arbitrator concern of potential bias (81% vs. 49%).<sup>20</sup> Correspondingly, fewer lawyers in tort motor vehicle cases than in contract cases said they struck an arbitrator for lack of subject matter expertise (16% v. 38%).

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<sup>18</sup> There were no statistically significant differences among the counties in the type of case ( $\chi^2(6) = 8.58, p = .20$ ). “Other” case types included employment, family, insurance bad faith, and breach of warranty claims.

<sup>19</sup> In Maricopa County, 54% of cases assigned to arbitration were tort motor vehicle and 30% were contract. *See supra* Section III.A.3. In Pima County, 70% of cases assigned to arbitration were tort motor vehicle and 14% were contract. *See supra* Section III.B.2.

<sup>20</sup>  $\chi^2(4) = 26.35, p < .001$ . Lawyers in tort non-motor vehicle cases fell between these two groups: 65% struck an arbitrator because of potential bias and 26% because of lack of subject matter expertise.



## **2. The Arbitration Process Before the Hearing**

The lawyers may peremptorily strike an arbitrator assigned to the case or may strike an arbitrator for cause.<sup>21</sup> Fewer than one-third of the lawyers in Maricopa and Pima Counties struck an arbitrator, but over half of the lawyers in the other counties struck an arbitrator.<sup>22</sup> The proportion of lawyers who said they struck an arbitrator is similar to the proportion of arbitrator re-appointments observed in case docket data for a sample of cases in Maricopa and Pima Counties.<sup>23</sup>

<b>Struck an Arbitrator</b>	Maricopa ( <i>n</i> = 632)	Pima ( <i>n</i> = 125)	Other Counties ( <i>n</i> = 52)	Statewide Total ( <i>n</i> = 883)
no	71.7%	69.6%	44.2%	68.6%
yes	28.3%	30.4%	55.8%	31.4%

Differences between Maricopa and Pima Counties in their efforts to assign arbitrators to cases based on their substantive expertise (which was not done in Maricopa County but was done in Pima County) did not seem to affect whether lawyers struck an arbitrator, as there was a similar proportion of arbitrator strikes in the two counties. It is unclear, however, why a majority of lawyers in the other counties struck an arbitrator, as most of those respondents were in counties that did not assign arbitrators based on subject matter.<sup>24</sup>

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<sup>21</sup> Ariz. R. Civ. P. 73(b).

<sup>22</sup> Lawyers in Maricopa and Pima Counties were less likely to strike an arbitrator than were lawyers in the other counties ( $F(2, 806) = 8.70, p < .001$ ).

<sup>23</sup> In a sample of tort and contract cases, an arbitrator was reappointed in 29% of cases in Maricopa County and 36% in Pima County. *See supra* Sections III.A.4.c, III.B.3.c.

<sup>24</sup> *See supra* Section II.B.

Concern about the arbitrator's potential bias was the primary reason a majority of lawyers struck an arbitrator. The next most common reason was the arbitrator's lack of subject matter expertise. The few lawyers who elaborated on the "other" reasons they had for striking an arbitrator referred to something the arbitrator had done or not done, such as ignoring a stipulation to continue arbitration, not accommodating the lawyer's schedule, or being abusive and demeaning.

<b>Reason for Striking an Arbitrator</b>	<b>Maricopa (n = 179)</b>	<b>Pima (n = 38)</b>	<b>Other Counties (n = 29)</b>	<b>Statewide Total (n = 277)</b>
concern of potential bias	64.8%	81.6%	51.7%	67.1%
arbitrator's lack of subject matter expertise	25.1%	13.2%	37.9%	23.1%
lacked any info about arbitrator	6.7%	2.6%	10.3%	6.9%
other	3.4%	2.6%	0%	2.9%

Lawyers in Pima County were less likely than those in Maricopa County, who in turn were less likely than those in the other counties, to say they struck an arbitrator for lack of substantive expertise.<sup>25</sup> The reverse pattern among the counties was seen in the proportion of lawyers who said they struck an arbitrator because of potential bias. The smaller proportion of lawyers in Pima County than in Maricopa County who said they struck the arbitrator because of lack of subject matter expertise would be consistent with efforts in Pima County to assign arbitrators based on their expertise. The larger proportion of strikes in Pima County than in Maricopa County due to concern of potential bias might suggest that a side effect of arbitrator assignment based on subject matter is to increase the likelihood that the arbitrator will be known to primarily represent "the other side." One lawyer's comment summed up the situation: "Arbitrators are either completely unfamiliar with the litigation process (and thus vulnerable to ploys by parties to use this ignorance to their advantage) or are so personally entrenched in either plaintiff or defense work that they are incapable of hearing a case openly and fairly."<sup>26</sup> Although some of the lawyers in the other counties were in counties that assigned arbitrators based on subject matter, they were even more likely than lawyers in Maricopa County to strike for lack of expertise. This would seem to suggest that the type of arbitrator assignment alone might not explain the pattern of findings.

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<sup>25</sup>  $\chi^2(2) = 6.24, p < .05$ .

<sup>26</sup> For additional comments about the arbitrators' knowledge of the subject matter, *see infra* Sections IV.B.3, IV.C.2 and IV.D.3.

A majority of lawyers (67% to 80%) reported that one or more continuances were granted in their case.<sup>27</sup> A similar proportion of cases in Maricopa and Pima Counties involved one or more continuances, despite differences between the counties in when the case was assigned to arbitration (after the answer versus after the motion to set was filed) and who decided the continuance (the arbitrator versus a judge).<sup>28</sup>

<b>Number of Continuances Granted</b>	<b>Maricopa (n = 515)</b>	<b>Pima (n = 105)</b>	<b>Other Counties (n = 40)</b>	<b>Statewide Total (n = 715 )</b>
None	31.7%	33.3%	20.0%	31.3%
1	46.0%	45.7%	40.0%	45.5%
2	17.1%	17.1%	32.5%	18.3%
3 to 5	5.3%	3.8%	7.5%	4.9%

This is a much larger number of continuances than observed in case docket data for a sample of cases in Maricopa and Pima Counties.<sup>29</sup> The case sample data definitely underestimated continuances because arbitrators did not routinely file an amended notice of hearing when the hearing was rescheduled. The survey responses, however, are likely to overestimate the proportion of cases in which continuances were granted because the survey respondents over-represented cases that went to a hearing and, thus, cases that might be more likely to involve continuances.<sup>30</sup> As a result, the actual proportion of continuances granted is likely to be between these two sets of figures.

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<sup>27</sup> There were no statistically significant differences among the counties ( $F(2, 657) = 2.74, p = .065$ ). Lawyers' views regarding the time frame for the hearing are discussed, *infra*, in Section IV.D.2.

<sup>28</sup> See *supra* Sections II.B.1, II.B.2.

<sup>29</sup> One or more continuances were recorded in 38% of cases in Maricopa County and 24% in Pima County. See *supra* Sections III.A.4.d, III.B.3.d.

<sup>30</sup> See *infra* note 35 and accompanying text.

The most common reasons for seeking a continuance were the need for additional information before the hearing and scheduling conflicts. Relatively few lawyers requested a continuance because they needed more time for negotiations, and even fewer requested a continuance because they needed a ruling on a motion. “Other” reasons for requesting a continuance included reasons such as a change in the parties or attorneys involved in the case (*e.g.*, consolidation of plaintiffs; insurance carrier accepted the case), the plaintiff needed additional medical treatment, and health problems of one of the lawyers.

<b>Main Reason Lawyers Sought a Continuance</b>	<b>Maricopa (<i>n</i> = 339)</b>	<b>Pima (<i>n</i> = 69)</b>	<b>Other Counties (<i>n</i> = 31)</b>	<b>Statewide Total (<i>n</i> = 498)</b>
scheduling conflicts	37.0%	46.6%	64.5%	40.4%
needed additional info for hearing	41.0%	28.8%	29.0%	39.2%
needed more time for negotiations	12.7%	17.8%	3.2%	12.2%
needed ruling on motion	5.1%	1.4%	3.2%	4.2%
other	4.2%	5.5%	0%	4.0%

The largest proportion of lawyers in Maricopa County sought a continuance because they needed more information before the hearing. By contrast, the largest proportion of lawyers in Pima County and the other counties requested a continuance because of scheduling conflicts.<sup>31</sup> The smaller proportion of continuances for the purpose of obtaining additional information in Pima County than in Maricopa County is consistent with the later assignment of cases to arbitration in Pima County<sup>32</sup> and, thus, the possibility that lawyers would have had more information by the scheduled hearing date. Although more of the lawyers in the other counties were in counties that assigned cases to arbitration after the answer was filed rather than later in litigation, the proportion who said they needed additional information was similar to that in Pima County. This would seem to suggest that the timing of assignment to arbitration is not the sole explanation for the differences among the counties in the reasons lawyers requested a continuance.

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<sup>31</sup> There were statistically significant differences among the counties in reasons for a continuance ( $\chi^2(6) = 14.59, p < .05$ ).

<sup>32</sup> See *supra* Sections II.B.1, II.B.2.

The arbitrator rather than the lawyers was responsible for the delay in when the hearing was held in some cases. A question on this issue was not included in the survey, but some of the lawyers commented they had trouble getting the arbitrator to schedule the hearing or to rule on a motion for summary judgment. Several lawyers noted they received no help from the court. The following comments illustrate these problems.

Arbitrator was non-responsive. I had to ask the court to issue an order to show cause to get the arbitration scheduled. Not surprisingly, the arbitrator was hostile at the arbitration.

There is too much onus on plaintiff's counsel to push and nudge the process along to comply with deadlines when the appointed arbitrator is less than cooperative. Plaintiff's counsel risks alienating the arbitrator by having to do so.

A motion to extend the time for filing a motion to set needed to be filed four or five times because the assigned arbitrator failed to make timely rulings or timely set the case for hearing. A year later we still have not had motions ruled on or a hearing date set.

Assigned Arbitrator was not interested in the case, ignored deadlines, ignored motions, and the court repeatedly deferred to the arbitrator, who continues to this date to take no action on the case whatsoever.

My client was very frustrated with the process because it took the arbitrator several months to rule on the very simple motion to strike the answer. It was only after several phone calls to his office reminding him that the motion was pending and the deadline for completing arbitration was fast approaching that the arbitrator acted on the motion. My client was very annoyed at the length of the process.

In one of my cases, I filed a motion for summary judgment on November 7, 2002. Because the arbitrator refused to rule, I filed a motion for summary adjudication re that motion on October 16, 2003. Notwithstanding, the case was dismissed by the Court in April of 2004 for "lack of prosecution." I had to waste more money and petition the court to reinstate the case. The Judge finally assigned a new arbitrator and I received the judgment in July 2004 - some 20 months after a simple motion for summary judgment was filed. That is appalling.

I represented the plaintiff on a suit to enforce a promissory note. The only dispute was when the default interest rate kicked in. Unfortunately, the arbitrator did nothing for months. . . . After several calls to the arbitrator's assistant accomplished nothing, a written request for the arbitrator to rule was filed . . . . More than 145 days after appointment of arbitrator, I filed a motion with the court to excuse the arbitrator, take the case back and rule on the pending motion. The judge declined to do so and simply ordered the arbitrator to promptly rule on the motion and set a hearing if needed. The arbitrator did finally deal with the case and an award was entered in April, 2004 granting my client all the relief sought.

My complaint here is the lack of assistance I received from the court. The arbitration clerk refused to get involved. I was told all that they would do is send out a notice after the deadline for hearing (120 days after appointment) expired. This notice was never sent out in my case, however. The only suggestion offered was to file an order to show cause with the assigned judge. Not a good option, obviously. I was also told that the arbitration clerk would not immediately take the steps contemplated by Rule 75(b) after the expiration of 145 days from appointment. Left with no option and at the risk of offending (and thereby creating a bias against my client) the arbitrator, I brought the matter to the attention of the assigned judge. The judge declined to discharge the arbitrator as appears to me to be required by Rule 75(b). While the case ultimately got resolved, it took another 3 1/2 months.

Across the counties, between 19% and 27% of the lawyers reported that they neither made nor received a serious settlement offer at any time.<sup>33</sup> Among lawyers who said they made or received a serious settlement offer, almost two-thirds reported that the first offer was made more than a month before the hearing. However, over one-fifth said that serious offers were first exchanged only within one month of the hearing, and 13% said serious offers were not exchanged until during or after the hearing.<sup>34</sup>

Timing of First Settlement Offer	Maricopa (n = 633)	Pima (n = 124)	Other Counties (n = 52)	Statewide Total (n = 697)
before or at pleadings	37.9%	27.5%	35.0%	36.0%
more than 1 month before hearing	27.3%	34.1%	37.5%	29.0%
within one month of hearing	20.7%	29.7%	22.5%	22.1%
during or after hearing, but before appeal	7.8%	6.6%	5.0%	7.5%
after appeal was filed	6.3%	2.2%	0%	5.5%

In the lawyers' comments, insurance company defendants in particular were criticized for rarely making settlement offers or for making them after the hearing or even after an appeal was filed. Other lawyers commented that there is no incentive to settle before the hearing because the arbitration award is non-binding.

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<sup>33</sup> There were no statistically significant differences among the counties ( $\chi^2(8) = 12.60, p = .127$ ).

<sup>34</sup> Because the survey respondents over-represented cases that went to a hearing, the timing of settlement offers reported here might be later than if it had been based on a more even mix of dispositions. See *infra* note 35 and accompanying text.

A relatively small number of the lawyers who responded to this section of the survey reported that their case settled (13% to 17% across the counties) or was otherwise resolved (2% to 4%) before the hearing. This is a much smaller proportion than observed in the court data.<sup>35</sup> This could be because, when asked to recall their most recent case in arbitration, lawyers might tend to focus on cases that had a hearing rather than on cases that settled without a hearing.

Because lawyers who responded to this section of the survey under-represented counsel whose arbitration case settled before a hearing, we do not know whether the following findings are representative of the timing of settlement of all cases assigned to arbitration that settled before a hearing. Among lawyers whose cases settled before the hearing, one-third or fewer reported their case settled before the hearing date was set.<sup>36</sup> Among lawyers in cases in which a hearing date was set, more reported their case settled within one month of the hearing than reported their case settled farther in advance of the hearing.<sup>37</sup>

<b>Settlement Timing, For Cases that Settled Before the Hearing</b>	<b>Maricopa (n = 105)</b>	<b>Pima (n = 18)</b>	<b>Other Counties (n = 7)</b>	<b>Statewide Total (n = 136)</b>
settled before hearing date set	27.6%	33.3%	28.6%	27.2%
settled more than one month before hearing	20.0%	27.8%	0%	20.6%
settled within one month of hearing	52.4%	38.9%	71.4%	52.2%

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<sup>35</sup> In most counties, roughly one-third to two-thirds of cases assigned to arbitration concluded before the hearing. *See supra* Section III.C.

<sup>36</sup> There were no statistically significant differences among the counties ( $\chi^2(4) = 3.23, p = .52$ ), possibly due to the small number of cases in the counties other than Maricopa County.

<sup>37</sup> Although the court data did not permit a precise determination of when cases settled in relation to the hearing date, those data also suggested that most cases did not settle far in advance of the hearing. *See supra* Sections III.A.4.h, III.B.3.h.



### **3. Lawyers' Views of the Hearing and the Arbitrator**

Most lawyers who had recently represented a client in arbitration had highly favorable assessments of the arbitration process. Lawyers' views of the arbitrator's performance were more mixed, but few had unfavorable assessments of either the process or the arbitrator. Because the survey respondents over-represented cases in which the award was appealed, and lawyers who appealed tended to be less satisfied with the arbitrator and the arbitration process,<sup>38</sup> the assessments reported here might be less favorable than if the survey respondents had been more representative of all case dispositions.

Lawyers in Pima County tended to have more favorable assessments of the hearing and the arbitrator than did lawyers in Maricopa County; the assessments of lawyers in the other counties tended to be less favorable, or no different, than those of lawyers in Maricopa County. Differences among the counties in practices regarding arbitrator selection and assignment might be possible reasons for these differences.<sup>39</sup> Pima County attempted to assign arbitrators to cases according to their general subject matter expertise, but Maricopa County and most of the other counties did not. Pima County drew its arbitrators primarily from lawyers who had appeared as counsel in a civil case in Superior Court, whereas Maricopa County and some of the other counties drew more broadly from members of the State Bar. In addition, arbitrators could be removed from the list of arbitrators upon request in Pima County but not in Maricopa County, while some of the other counties relied primarily on lawyers who volunteered to serve as arbitrators.

There are several alternative explanations, however, for the more favorable assessments in Pima County that are related to differences in the composition of survey respondents. First, a larger proportion of Pima County lawyers who responded to this section of the survey had represented the plaintiff, and plaintiffs' lawyers tended to have more favorable views of the process than did defense lawyers.<sup>40</sup> Second, fewer survey respondents in Pima County said the award had been appealed than in Maricopa County, and lawyers who did not appeal the award had more favorable assessments than lawyers who appealed.<sup>41</sup> County differences in assessments largely, but not entirely, disappeared when looking separately at assessments of plaintiffs' and defense lawyers and when

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<sup>38</sup> See *infra* Sections IV.B.5 and IV.B.6.b.

<sup>39</sup> See *supra* Section II.B.

<sup>40</sup> See *supra* note 15 and accompanying text.

<sup>41</sup> See *infra* Sections IV.B.5, IV.B.6.

looking separately at assessments of lawyers who appealed and those who did not. Thus, these differences among the counties in the composition of survey respondents seemed to play a large role in, but did not entirely explain, the pattern of observed differences in assessments among the counties.

The largest proportion of lawyers felt that the hearing process was very fair, and most felt the hearing process was very or somewhat fair. Lawyers in Pima County thought the hearing process was more fair than did lawyers in Maricopa County and the other counties.<sup>42</sup> Interestingly, this was the only assessment that was affected by whether or not continuances were granted: lawyers in cases with no continuances thought the hearing process was more fair than did lawyers in cases involving one or more continuances.<sup>43</sup>

<b>Fairness of the Hearing Process</b>	<b>Maricopa (<i>n</i> = 499)</b>	<b>Pima (<i>n</i> = 107)</b>	<b>Other Counties (<i>n</i> = 43)</b>	<b>Statewide Total (<i>n</i> = 700)</b>
very unfair	6.2%	4.7%	4.7%	6.1%
somewhat unfair	12.0%	5.6%	18.6%	11.4%
somewhat fair	31.5%	24.3%	32.6%	31.6%
very fair	50.3%	65.4%	44.2%	50.9%

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<sup>42</sup>  $F(2, 646) = 3.92, p < .05$ . The assessments of lawyers in Maricopa County, while different from those in Pima County, did not differ from those of lawyers in the other counties.

<sup>43</sup>  $F(1, 565) = 6.92, p < .01$ .

Virtually all lawyers felt they were given sufficient opportunity to fully present their client's case during the hearing. Pima County lawyers were more likely to feel they had the opportunity to fully present their case than were lawyers in Maricopa County and the other counties.<sup>44</sup>

<b>Could Fully Present Case During Hearing</b>	<b>Maricopa (n = 500)</b>	<b>Pima (n = 105)</b>	<b>Other Counties (n = 43)</b>	<b>Statewide Total (n = 701)</b>
No	7.2%	1.0%	11.6%	6.8%
Yes	92.8%	99.0%	88.4%	93.2%

Following are illustrative comments of lawyers who felt they could not fully present their case.

The arbitrator just said the hearing was going to end at a certain time no matter what. This made us hurry up the process more than I would have liked.

The arbitrator hurried the arbitration hearing and refused to allow me to call three different witnesses. Accordingly, I was not surprised with the result.

The arbitrator has limited time and little preparation so the hearing is abbreviated and often whoever goes second or last ends up with little hearing time.

The Plaintiff took about 4 hours to present his case and the co-defendant took 2 hours. This left me about 30 minutes to put on my case. I ended up calling only 1 of 3 witnesses that I originally planned to call.

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<sup>44</sup>  $F(2, 645) = 3.83, p < .05$ . The assessments of lawyers in Maricopa County, while different from those in Pima County, did not differ from those of lawyers in the other counties.

Most lawyers felt the arbitrator was not at all biased. Few lawyers felt the arbitrator was very biased.<sup>45</sup>

<b>Arbitrator Biased</b>	<b>Maricopa (n = 497)</b>	<b>Pima (n = 106)</b>	<b>Other Counties (n = 42)</b>	<b>Statewide Total (n = 695)</b>
not at all	78.9%	84.9%	71.4%	79.3%
somewhat	16.1%	15.1%	26.2%	16.8%
very biased	5.0%	0%	2.4%	3.9%

Following are illustrative comments of the ways in which lawyers thought the arbitrator appeared biased.

Clear written integrated terms of the contract were ignored. Defense attorney and arbitrator talked at length together about when they used to work together. They were still talking when we left, a "Those were the good ole' days" type conversation.

Arbitrators have not been obviously biased BUT too often they meddle with the adversary process. They create issues not raised by the pro se defendant. They take on a role not appropriate to the proceedings (counsel for the defense). . . . In virtually every case, however, the ultimate findings and award were fair.

The arbitrator, who was a defense attorney, allowed the defense to offer evidence on causation but barred the plaintiff from providing rebuttal evidence on the same issue.

The arbitrator made it clear that he had suffered an injury similar to the plaintiff's and made it known how painful those type of injuries were. He asked if I had ever experienced this type of injury. When I attempted to make a distinction between plaintiff's diagnosed injury and plaintiff's claimed injury, he asked "are you suggesting that plaintiff's injury isn't painful?". . . He informed me (defense counsel) out loud in front of all parties that he would submit an award within a week and "needless to say, you are not going to be happy."

The case was not decided on the merits but based upon who had a past relationship, good or bad, with the arbitrator.

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<sup>45</sup> There were no statistically significant differences among the counties ( $F(2, 642) = 2.35, p = .096$ ).

Most lawyers felt the arbitrator was either very or somewhat prepared; relatively few felt the arbitrator was not at all prepared. Lawyers in Pima County felt the arbitrator was more prepared than did lawyers in Maricopa County, who in turn thought the arbitrator was more prepared than did lawyers in the other counties.<sup>46</sup>

<b>Arbitrator Preparation Level</b>	Maricopa ( <i>n</i> = 496)	Pima ( <i>n</i> = 105)	Other Counties ( <i>n</i> = 43)	Statewide Total ( <i>n</i> = 697)
not at all	7.3%	4.8%	14.0%	7.7%
somewhat	47.8%	39.0%	53.5%	47.3%
very prepared	45.0%	56.2%	32.6%	44.9%

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<sup>46</sup>  $F(2, 641) = 4.60, p < .05$ .

A majority of lawyers in Maricopa and Pima Counties, but fewer than half in the other counties, felt the arbitrator had a very good understanding of the issues involved in the case. Few lawyers in any of the counties thought the arbitrator did not understand the issues at all. Lawyers in Pima County thought the arbitrator had a better understanding of the issues than did lawyers in Maricopa County, who in turn thought the arbitrator had a better understanding of the issues than did lawyers in the other counties.<sup>47</sup> The higher ratings in Pima County would be consistent with their practice of matching arbitrators to cases by broad subject areas; Maricopa County and most of the other counties do not assign arbitrators based on case subject matter.

<b>Arbitrator Understood Issues</b>	Maricopa ( <i>n</i> = 498)	Pima ( <i>n</i> = 106)	Other Counties ( <i>n</i> = 43)	Statewide Total ( <i>n</i> = 701)
not at all	6.8%	1.9%	11.6%	6.8%
somewhat	39.0%	27.4%	46.5%	38.7%
very well	54.2%	70.8%	41.9%	54.5%

Following are a few illustrative comments on the problem of arbitrators hearing cases outside of their area of expertise.<sup>48</sup> A few lawyers noted that the arbitrators' efforts overcame their lack of expertise.

The arbitrator had no experience with the issues and was ill-equipped to make a reasoned determination.

I had no confidence in the arbitrator's decision because he didn't understand the issues.

The arbitrator wanted to inject legal concepts involving tort law that had nothing to do with contract law.

This arbitrator did not practice actively in litigation, but he took a serious and deliberate role in the proceeding, and was very attentive to the issues and the law.

The arbitrator had reviewed the file and pre-arbitration statement, and made a good effort to understand the legal issues involved, notwithstanding their inexperience in civil matters generally. However, the arbitration lasted much longer as a result of the inexperience.

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<sup>47</sup>  $F(2, 644) = 7.84, p < .001$ .

<sup>48</sup> For additional comments on this point, see *infra* Sections IV.C.2, IV.D.3.

A majority of lawyers in Pima County, but fewer than half of the lawyers in Maricopa County and the other counties, thought the arbitrator was very knowledgeable about arbitration procedures.<sup>49</sup> Few lawyers in any of the counties thought the arbitrator was not at all knowledgeable about arbitration procedures.

<b>Arbitrator Knew Arb. Procedure</b>	<b>Maricopa (<i>n</i> = 497)</b>	<b>Pima (<i>n</i> = 107)</b>	<b>Other Counties (<i>n</i> = 43)</b>	<b>Statewide Total (<i>n</i> = 700)</b>
not at all	7.6%	0%	11.6%	7.0%
somewhat	43.3%	31.8%	48.8%	43.3%
very knowledgeable	49.1%	68.2%	39.5%	49.7%

Lawyers' comments indicated a dissatisfaction with the arbitrators' lack of knowledge of arbitration procedures in specific, and civil procedure in general.

There needs to be a comprehensive guide to conducting arbitrations that is available to BOTH the arbitrators and the attorneys (similar to the Short Trial Procedure book) so that everyone is playing by the same set of known rules.

The arbitration process was damaging to my client because the arbitrator failed to enforce the rules of arbitration against the plaintiff's attorney concerning hearing dates, arbitration memos, preparedness, and presentation of evidence.

The arbitrator conducted an "informal" meeting without allowing my clients to attend and then issued an arbitration award before having a formal hearing.

The other side failed to follow procedural rules and the arbitrator seemed reluctant to impose sanctions or even force the defendant to live with the procedural consequences of his omissions.

The worst part about the arbitration process is arbitrators who know nothing about the litigation process, and who refuse to even consider a motion for summary judgment and insist on holding a hearing, which happens frequently. This only causes delay and unnecessary attorneys' fees.

At some point, arbitrators have to enforce the Rules of Civil Procedure regarding disclosure and refuse to allow a party to use documents and theories that have not been disclosed.

The arbitrator made decisions that were in clear violation of the rules of civil procedure.

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<sup>49</sup>  $F(2, 644) = 10.34, p < .001$ . The assessments of lawyers in Maricopa County, while different from those in Pima County, did not differ from those of lawyers in the other counties.

Most lawyers felt the other side participated in good faith during the hearing.<sup>50</sup> Lawyers' comments, however, suggested that nonetheless there were problems, even if they did not involve "bad faith" during the hearing.

<b>Other Side Participated in Good Faith</b>	<b>Maricopa (n = 496)</b>	<b>Pima (n = 107)</b>	<b>Other Counties (n = 42)</b>	<b>Statewide Total (n = 698)</b>
No	17.9%	15.0%	16.7%	17.6%
Yes	82.1%	85.0%	83.3%	82.4%

The other side submitted sloppy and incomplete disclosure and discovery responses which kept a great deal of their evidence out. The other side did not seem to care that they were going to lose because they knew they would appeal.

I've found that arbitration is simply one more delay tool for an opposing side. The party with the stronger position in the case is forced to litigate to a hearing, conduct limited discovery, all the while knowing that the other side will do little, go through the "motions" and an appeal before any serious settlement is offered.

There are no penalties for failing to play nicely or abide by the rules.

The whole thing was pointless – the defendant had already stated that if they lost the arbitration, they would appeal.

I have participated in at least 75 arbitrations in Arizona State Courts . . . involving lemon law cases/breach of warranty against large, well-funded, highly litigious manufacturers. During 2002 no manufacturer defendant would settle before taking a bite of the apple at arbitration regardless of the individual case merits. In only 3 cases out of the over 200 Arbitrations my firm has participated in the last three years has there been a settlement during or shortly after the Arbitration. . . . It is their standard practice to force every case into Arbitration, and then automatically appeal when they lose. I say this with an 87% win rate at Arbitration so far.

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<sup>50</sup> There were no statistically significant differences among the counties ( $F(2, 642) = .28, p = .755$ ).



A small percentage of lawyers reported that the case settled either during the hearing or before receiving the arbitrator's notice of decision.<sup>51</sup>

<b>Case Settled At Hearing or Before Notice of Decision</b>	<b>Maricopa (<i>n</i> = 494)</b>	<b>Pima (<i>n</i> = 106)</b>	<b>Other Counties (<i>n</i> = 49)</b>	<b>Statewide Total (<i>n</i> = 694)</b>
No	95.7%	96.2%	90.2%	95.4%
Yes	4.3%	3.8%	9.8%	4.6%

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<sup>51</sup> There were no statistically significant differences among the counties (  $\chi^2(2) = 2.82, p = .244$  ).

#### **4. Lawyers' Views of the Award**

A majority of lawyers had favorable or somewhat favorable assessments of the arbitration award. A sizeable minority of lawyers, however, had unfavorable assessments of the award. There were no statistically significant differences among the counties in lawyers' assessments of the award, despite differences in their practices regarding arbitrator selection and assignment.

Because the survey respondents over-represented cases in which the award was appealed, and lawyers who appealed tended to be less satisfied with the award,<sup>52</sup> the assessments reported here might be less favorable than would be found if the survey respondents had been more representative of the distribution of case dispositions.

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<sup>52</sup> See *infra* Section IV.B.5.

A majority of lawyers received the arbitrator's notice of decision within ten days of the hearing, as prescribed in the compulsory arbitration rules.<sup>53</sup> Few lawyers received the notice of decision more than one month after the hearing, although the longest interval was 180 days.<sup>54</sup>

<b>Days from Hearing to Notice of Decision</b>	<b>Maricopa (n = 441)</b>	<b>Pima (n = 100)</b>	<b>Other Counties (n = 34)</b>	<b>Statewide Total (n = 602)</b>
10 or fewer	63%	69%	76%	64%
11 - 30	29%	27%	18%	29%
31 - 60	6%	3%	3%	5%
more than 60	2%	1%	3%	2%

Several lawyers commented on the long time before they received the notice of decision and the consequences of that delay.

The arbitrator violated the rules of procedure by taking an inexcusably long time to rule on the matter after the hearing was over. This leads me to believe that she simply forgot many of the detailed damages issues that were critical to my defense of the case, by the time she ruled.

It wasn't until the Judge threatened to take the case back that the arbitrator issued the award.

After 8 months, the Arbitrator has still not signed the entry of award.

We never received a ruling from the arbitrator. We were not even able to file an appeal. We are going to go back to the presiding judge and ask for direction.

The arbitrator did not file the award until after the clerk entered a dismissal for lack of prosecution, and we had to get a court order to reverse it.

Arbitrator delayed in entering the award and I had to file motion to compel entry of award.

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<sup>53</sup> Ariz. R. Civ. P. 75(a).

<sup>54</sup> There were no statistically significant differences among the counties ( $F(2, 572) = .96, p = .384$ ).

The largest proportion of lawyers felt the arbitrator's award was very fair in light of the facts and the law, and a majority thought the award was either somewhat or very fair.<sup>55</sup> Approximately one-third of the lawyers, however, thought the award was either somewhat or fair unfair. Lawyers had less favorable ratings of the fairness of the award than of the fairness of the hearing process.<sup>56</sup>

<b>Fairness of the Award</b>	<b>Maricopa (n = 467)</b>	<b>Pima (n = 103)</b>	<b>Other Counties (n = 38)</b>	<b>Statewide Total (n = 643)</b>
very unfair	15.8%	7.8%	18.4%	14.2%
somewhat unfair	16.9%	12.6%	15.8%	16.6%
somewhat fair	25.9%	33.0%	31.6%	28.1%
very fair	41.3%	46.6%	34.2%	41.1%

The following are illustrative comments from some of the lawyers who elaborated on the ways in which the award was unfair.

The arbitrator entered a ruling on a motion for summary judgment that was clearly designed to force a settlement rather than the result of any type of legal analysis.

The arbitrator knew what the case was about, but he did not understand the law. Despite being provided the law by both parties, it was apparent from the ruling that the arbitrator either did not read the cases or ignored them.

Lawyers--as arbitrators--don't give awards commensurate with actual case value. In other words, an arbitration award typically is higher than what a jury would award on appeal. Also, we (myself included) are too inclined to "split the baby" when a full verdict ought to be rendered for or against a litigant.

The arbitrator's decision was nonsensical and contrary to the evidence (e.g., finding an injury, accepting medical bills in full and lost wages due to the injury, but awarding nothing for pain and suffering).

The arbitrators tend to err on the side of a recovery for the filing party regardless of the merits of the case, especially in cases of disputed liability.

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<sup>55</sup> There were no statistically significant differences among the counties ( $F(2, 605) = 2.80, p = .062$ ).

<sup>56</sup>  $t(639) = 8.56, p < .001$ .

An arbitrator who does not know the area of law tends to award something to the other side because they feel bad, don't know, etc.

The arbitrator made a ruling that was inconsistent with the positions of either party, and which could not be reconciled under the law or facts, but ended up obviously "splitting the baby." His comments in ruling made clear that he did not have a grasp of the evidence or the law that had been presented to him.

The Defendant was allowed to bring in her financial circumstances and bad luck that occurred to her after she incurred the debt that had nothing to do with her breach of the debt and bouncing of the check. . . . The arbitrator felt sorry for her and made it clear that he didn't think that he would be awarding the entire amount of the debt even though she wrote an insufficient funds check, which was NEVER DISPUTED, was sent numerous collection letters, had calls and was sent a 12 day statutory letter! So we settled for half before he made his decision.

A solution needs to be found to provide defendants with fairness in the process. When arbitrators award defense verdicts rarely, while juries do it often, the system is not working; when arbitrators award about double on average what juries do with the same facts, the system is not working.

In closing argument plaintiffs requested an award of \$130,000 despite having certified the case as subject to arbitration. The arbitrator awarded plaintiffs' full request plus attorneys fees.

The arbitrator made no findings - very difficult to explain to client when ruling does not specify any grounds for the award. When ruling gives basis at least a party feels as though the arbitrator considered the evidence and law and made a sincere attempt to rule appropriately.

When the arbitrator filed her decision, both sides were surprised at the fact that it was completely in the Plaintiff's favor and contrary to the law.

The arbitrator gives some arbitrary award that makes no one happy but not unhappy enough to appeal. This leads to inflated and unjust judgments against defendants in tort motor vehicle cases. Many defense attorneys including myself treat it as a necessary evil and simply try to get through it in order to present the case to a jury.

I have frequently represented parties in contract cases subject to arbitration. The outcome of these cases can make or break the small businesses and ordinary citizens involved, but the arbitrators rarely seem to know anything about the substantive law, or care at all about deciding the cases fairly. The message is clear: Do not come here looking for justice, we're too busy with the "important" cases to be bothered with yours.

Over half of the lawyers thought the arbitrator's award was about the same as the outcome they would have expected if the case went to trial. Over one-third of the lawyers thought the award was worse than the expected trial judgment. Few lawyers thought the award was better than the expected trial judgment.<sup>57</sup>

<b>How the Award Compared to the Expected Trial Outcome</b>	<b>Maricopa (n = 467)</b>	<b>Pima (n = 101)</b>	<b>Other Counties (n = 38)</b>	<b>Statewide Total (n = 640)</b>
award worse than expected judgment	38.8%	30.7%	50.0%	37.8%
about the same	52.7%	60.4%	42.1%	53.4%
award better than expected judgment	8.6%	8.9%	7.9%	8.8%

A majority of lawyers reported that their client was somewhat or very satisfied with the arbitrators' award.<sup>58</sup>

<b>Client Satisfaction with the Award</b>	<b>Maricopa (n = 467)</b>	<b>Pima (n = 103)</b>	<b>Other Counties (n = 38)</b>	<b>Statewide Total (n = 643)</b>
very dissatisfied	21.2%	14.6%	31.6%	20.5%
somewhat dissatisfied	19.3%	14.6%	15.8%	19.0%
somewhat satisfied	27.4%	43.7%	28.9%	29.9%
very satisfied	32.1%	27.2%	23.7%	30.6%

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<sup>57</sup> There were no statistically significant differences among the counties ( $F(2, 603) = 1.62, p = .199$ ).

<sup>58</sup> There were no statistically significant differences among the counties ( $F(2, 605) = 1.72, p = .180$ ).

## **5. Appeal and Final Disposition of Arbitration Cases**

Among the lawyers who responded to the survey, over half in Maricopa County, but fewer in Pima County and the other counties, reported that the arbitrators' award was appealed.<sup>59</sup> This appeal rate was substantially higher than the appeal rate observed in court data, particularly in Maricopa County.<sup>60</sup> Thus, appealed cases were over-represented among survey respondents. In the cases in which an appeal was filed, both plaintiffs' and defense lawyers were more likely to say the defense (in 62% of the cases) rather than the plaintiff (in 38% of the cases) filed the appeal.<sup>61</sup>

<b>Appealed the Award</b>	<b>Maricopa (<i>n</i> = 450)</b>	<b>Pima (<i>n</i> = 98)</b>	<b>Other Counties (<i>n</i> = 37)</b>	<b>Statewide Total (<i>n</i> = 620)</b>
No	47.8%	61.2%	59.5%	50.2%
Yes	52.2%	38.8%	40.5%	49.8%

A number of lawyers commented on why they did not file an appeal; others commented on the problems of some parties having a standard policy of appealing regardless of the award.<sup>62</sup>

By the time of the arbitration award, my client had incurred legal fees in excess of \$18,000. My client was not willing to proceed and incur more expense at that time.

The cost of the appeal after having gone through the arbitration process contributed to my client's willingness to pay something to settle the case. However, this is not the result the client really wanted. The client felt that the plaintiff's case was garbage, but after having paid so much in attorneys' fees for the arbitration process and literally starting over in the appeals process, it was more cost effective to pay than to litigate.

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<sup>59</sup>  $\chi^2(2) = 7.02, p < .05$ .

<sup>60</sup> Based on court data, the appeal rate in Maricopa and Pima Counties was 22%, and ranged from 17% to 46% in the other counties. Based on data from a sample of cases, the appeal rate was 39% in Maricopa County and 37% in Pima County. *See supra* Section III.C.

<sup>61</sup>  $\chi^2(1) = 17.29, p < .001$ .

<sup>62</sup> For additional comments on the current appeal disincentive, *see infra* Section IV.D.2.

We were not notified of the filing of the judgement, the appeal time lapsed, or an appeal would have occurred.

Being forced to settle for less to avoid a costly trial is unfair to parties and attorneys who receive fair award from a good arbitrator.

Oftentimes, the goal as a plaintiff's attorney is to underplay the case, not achieve too favorable a result, and not provoke an appeal. A highly favorable result in arbitration simply provokes an appeal and places little risk of sanctions for defendants.

When you are dealing with one of the major insurance companies. . . if you get an arbitration award that is anywhere even near reasonable, they will always appeal. It's a major problem because the entire process is now prolonged and defendant carriers are in a position to force you to settle for less than the original award. This is because the plaintiff is now forced to spend lots of money for expert witness testimony which is not a recoverable cost.

Insurance defense attorney are abusing the appellate system and destroying the efforts of some arbitrators who do good jobs and render fair decisions – they then offer less with the threat of a jury trial with a lot of unnecessary expense.



A majority of lawyers in cases that did not accept the arbitrator's award felt the award made no contribution to settlement negotiations.<sup>63</sup>

<b>Award's Contribution to Settlement</b>	<b>Maricopa (n = 223)</b>	<b>Pima (n = 34)</b>	<b>Other Counties (n = 14)</b>	<b>Statewide Total (n = 293)</b>
not at all	58.7%	67.6%	78.6%	60.8%
somewhat	26.9%	23.5%	21.4%	26.6%
a great deal	14.3%	8.8%	0%	12.6%

Some lawyers' comments indicated that when they said the award contributed to settlement, it was not because it helped them resolve issues or value the case.

The arbitration process has contributed to my clients' desire to settle in that the time and expense of the proceedings has caused them to question their financial ability to proceed to trial.

The arbitrator's award contributed to settlement to the extent that it forced my client into a corner. She did not want to pay more in legal fees to go to trial, where, in my humble opinion, she would have fared much better before a judge and/or a jury. Therefore, she settled just to move on. Her initial monetary loss was compounded by having to pay for my fees plus a settlement to make the case go away. A \$7000 case turned into a \$15000 very quickly.

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<sup>63</sup> There were no statistically significant differences among the counties ( $F(2, 268) = 1.97, p = .14$ ).

Among cases in which the arbitrator's award was not appealed, most cases were resolved by both sides accepting the award.<sup>64</sup> In a minority of cases that were not appealed, the parties did not accept the award but reached a settlement after they had received the arbitrator's notice of decision.

<b>Disposition in Cases Where Appeal Was Not Filed</b>	<b>Maricopa (<i>n</i> = 215)</b>	<b>Pima (<i>n</i> = 60)</b>	<b>Other Counties (<i>n</i> = 22)</b>	<b>Statewide Total (<i>n</i> = 311)</b>
both sides accepted award	79.5%	88.3%	77.3%	80.7%
settled after notice of decision	20.5%	11.7%	22.7%	19.3%

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<sup>64</sup> There were no statistically significant differences among the counties ( $\chi^2(2) = 2.61, p = .272$ ). These figures are similar to those observed in case docket data for a sample of cases in Maricopa and Pima Counties. *See supra* Sections III.A.4.a, III.B.3.a.

Among cases in which the arbitrator's award was appealed, the largest proportion of cases settled (32% to 42% across the counties).<sup>65</sup> From 17% to 29% of the appealed cases were resolved by trial judgment, and a small number were resolved by dispositive motion. Approximately one-fourth of the appealed cases were still pending, and another 12% had some other disposition.<sup>66</sup>

The trial rate reported here for Pima County was higher than that observed in case docket data for a sample of cases.<sup>67</sup> In both Maricopa and Pima Counties, the settlement rate reported here was lower, and the proportion of pending cases was higher, than that observed in case docket data for a sample of cases.<sup>68</sup> Thus, cases that went to trial on appeal were over-represented among survey respondents in Pima County. Given the small number of lawyers whose cases went to trial and the fact that their assessments generally did not differ from those of lawyers whose cases settled on appeal, however, this over-representation was not likely to affect the assessments reported here.

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<sup>65</sup> There were no statistically significant differences among the counties ( $\chi^2(8) = 6.01, p = .646$ ).

<sup>66</sup> Virtually all of the lawyers who elaborated on their selection of "other" said the case was still pending. We put those responses into a new category of pending cases. We could not determine, however, how many lawyers who answered "other" but did not comment also were involved in a pending case. Thus, it is likely that some of the "other" cases were in fact still awaiting a final resolution.

<sup>67</sup> Eleven percent of appealed cases went to trial in a sample of cases in Pima County. *See supra* Section III.B.3.a. Sixteen percent of appealed cases went to trial in a sample of cases in Maricopa County. *See supra* Section III.A.4.a. The trial rate on appeal ranged from zero to 27% in the other counties. *See supra* Section III.C.2.

<sup>68</sup> Eighty percent of appealed cases in a Pima County case sample and 62% in a Maricopa County case sample settled. Eight percent of appealed cases in a sample of cases in Pima County and 16% in Maricopa County were still pending. *See supra* Sections III.A.4.a. and III.B.3.a. The survey respondents' cases that were still pending would likely settle eventually.

## **6. Impact of Various Factors on Assessments and Appeals**

### **a. Relationships Between Lawyers' Views of Aspects of Arbitration and Their Perceptions of Fairness**

We examined the extent to which lawyers' assessments of six different aspects of the arbitration process and the arbitrator were related to their perceptions that the hearing process and the award were fair.<sup>69</sup> Combined in multiple regression analyses, this set of six assessments accounted for almost half of the variation in lawyers' views of the fairness of the hearing process (47%) and the fairness of the award (42%).<sup>70</sup>

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<sup>69</sup> Lawyers who thought the hearing process was fair were more likely also to think the award was fair ( $r(638) = .575$ ,  $p < .001$ ).

<sup>70</sup> Process:  $F(6, 666) = 98.02$ ,  $p < .001$ ,  $R = .685$ ,  $R^2 = .47$ ; Award:  $F(6, 611) = 74.76$ ,  $p < .001$ ,  $R = .651$ ,  $R^2 = .42$ . The percentage of variation accounted for tells us how well a group of variables included in a predictive model (here, views of the arbitration process and arbitrator) accounts for what one seeks to predict (here, perceived fairness). Zero percent of variation accounted for would reflect a complete absence of predictive power, and 100% would reflect perfect predictive power. See RUNYON & HABER, *supra* note 6.

The two assessments that were most strongly related to greater perceived fairness of the hearing process and the award were that the arbitrator understood the issues in the case and was not biased. The two assessments that were the next most strongly related to greater perceived fairness were that the arbitrator was prepared for the hearing and knew arbitration procedure.<sup>71</sup> Lawyers' sense that they were able to fully present their case had a smaller relationship with the greater perceived fairness of the hearing process and the award. Lawyers' views that the other side participated in good faith had a small relationship with their perception that the hearing process was fair, but was not related to the perceived fairness of the award. These analyses suggest that lawyers' assessments of the arbitrators' competence and neutrality were strongly related to lawyers' perceptions that the hearing process and the award were fair.<sup>72</sup>

<b>Relationships Between Lawyers' Views of Arbitration and Their Perceptions of Fairness</b>		
<b>Lawyers' Views</b>	<b>Fairness of the Hearing Process</b>	<b>Fairness of the Arbitrator's Award</b>
Arbitrator understood issues	.532 ***	.546 ***
Arbitrator was not biased	-.518 ***	-.509 ***
Arbitrator was prepared	.489 ***	.443 ***
Arbitrator knew arbitration procedure	.420 ***	.350 ***
I could fully present client's case	.356 ***	.266 ***
Other side participated in good faith	.084 *	.034
Note: Numbers in the table are Pearson correlation coefficients ( <i>r</i> ). * <i>p</i> < .05 *** <i>p</i> < .001		

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<sup>71</sup> Lawyers' assessments of the arbitrator's preparation, understanding of the issues, and knowledge of arbitration procedures were highly interrelated (*r*'s of .55 to .62, *p*'s < .001). Lawyers' assessment of whether the arbitrator was biased was moderately related to the above assessments (*r*'s of .31 to .33, *p*'s < .001). The value of the correlation coefficient (Pearson *r*) indicates the strength of the relationship between two variables and ranges from +1.00 to -1.00, with 0.00 representing no relationship between the variables. See RUNYON & HABER, *supra* note 6.

<sup>72</sup> Correlations tell us only that these measures are related; they do not tell us that one caused the other or the direction of the effect. Thus, it is possible that perceptions of the award affected perceptions of the arbitration process, rather than vice versa.

## **b. Relationships Between Lawyers' Views of Aspects of Arbitration and Appeal**

Not surprisingly, lawyers who had more favorable assessments of the arbitration award, process, and arbitrator were less likely to appeal the award.<sup>73</sup> Combined in a multiple regression analysis, this set of assessments accounted for 39% of the variation in whether lawyers appealed the award.<sup>74</sup> The three assessments of the award were more strongly related to whether an appeal was filed than were assessments of the process and the arbitrator.<sup>75</sup> Lawyers who thought the award was unfair and worse than they expected the trial judgment to be, and especially lawyers whose clients were dissatisfied with the award, were more likely to file an appeal than were lawyers who had more favorable views of the award. Lawyers' views that the arbitrator did not understand the issues and was biased and that the hearing process was not fair were the set of assessments next most strongly related to the award being appealed.

<b>Relationships Between Lawyers' Views of Arbitration and Whether They Appealed of the Award</b>	
<b>Lawyers' Views</b>	<b>Pearson <i>r</i></b>
Client was not satisfied with award	-.583 ***
Award was not fair	-.501 ***
Award was worse than expected trial outcome	-.489 ***
Arbitrator did not understand issues	-.403 ***
Arbitrator was biased	.358 ***
Hearing process was not fair	-.353 ***
Arbitrator was not prepared	-.319 ***
Arbitrator did not know arbitration procedure	-.287 ***
Lawyer could not fully present client's case	-.219 ***
Other side did not participate in good faith	.063
*** $p < .001$	

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<sup>73</sup>  $F(10, 578) = 37.09, p < .001, R = .625, R^2 = .391$ .

<sup>74</sup> These assessments probably accounted for a smaller proportion of the variation in whether the award was appealed than in the lawyers' perceptions of fairness because considerations other than their views, such as the time and cost associated with an appeal, would enter into the decision to file an appeal.

<sup>75</sup> For example, 90% of the lawyers who appealed the award, compared to 25% who did not appeal, thought the award was worse than expected.

## **C. Lawyers' Experience as Arbitrators**

The second section of the survey was directed at lawyers' experience as arbitrators in Arizona's mandatory court-connected arbitration program. The lawyers were instructed to answer the questions with regard to the most recent completed case to which they had been assigned as an arbitrator within the preceding two years.<sup>76</sup> A total of 2,016 lawyers responded to this section of the survey.

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<sup>76</sup> For an explanation of this approach, *see supra* note 5 and accompanying text.

## **1. Respondents to This Section of the Survey**<sup>77</sup>

Of the lawyers who responded to this section of the survey, most had served as an arbitrator in one to four cases in the preceding two years. This is consistent with the courts' general practice of assigning each lawyer up to two hearings per calendar year,<sup>78</sup> although in some counties, a handful of lawyers volunteer to arbitrate most of the cases.<sup>79</sup> Lawyers in Pima County had arbitrated more cases in the prior two years than had lawyers in the other counties, who in turn had arbitrated more cases than lawyers in Maricopa County.<sup>80</sup> Almost one-fourth of lawyers in Pima County had served as an arbitrator in five or more cases in the preceding two years. Perhaps not surprisingly, arbitrators who had arbitrated more cases in the prior two years were more likely to say that they were familiar with arbitration procedures.<sup>81</sup>

<b>Number of Cases Served as Arbitrator, Prior 2 Years</b>	<b>Maricopa (<i>n</i> = 1579)</b>	<b>Pima (<i>n</i> = 180)</b>	<b>Other Counties (<i>n</i> = 93)</b>	<b>Statewide Total (<i>n</i> = 1873 )</b>
0	3.4%	2.8%	3.2%	3.4%
1	15.1%	11.1%	24.7%	15.1%
2	35.7%	26.1%	32.3%	34.4%
3	26.3%	16.7%	12.9%	24.6%
4	13.4%	18.9%	11.8%	13.8%
5 or more	6.3%	24.4%	15.1%	8.7%

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<sup>77</sup> These respondents included 63 lawyers who said they had been appointed to serve as an arbitrator in the prior two years and answered questions in this section of the survey, but who said in a subsequent section that they had not served as an arbitrator in the prior two years. We had no way to determine which of their responses regarding their arbitrator service was valid, so we included their responses here.

<sup>78</sup> Arbitrators may be excused if they have already completed contested hearings in two or more cases in the current calendar year. *See* Ariz. R. Civ. P. 73(e)(3).

<sup>79</sup> *See supra* Section II.B.3.

<sup>80</sup>  $F(2, 1849) = 31.87, p < .001$ .

<sup>81</sup>  $r(1527) = .08, p < .01$ .



Most of the lawyers who responded to this section of the survey had little or no experience as counsel in the arbitration process. Only 20% of the lawyers in Maricopa County and approximately one-third of the lawyers in Pima County and the other counties reported that ten percent or more of their caseload was subject to arbitration. Lawyers who had served as arbitrators in Maricopa County had a smaller proportion of their caseload subject to arbitration than did lawyers in Pima County and the other counties.<sup>82</sup> Arbitrators who had a larger proportion of their caseload subject to arbitration were more likely to say that they were familiar with the area of law in the case they arbitrated, they were familiar with arbitration procedures, and they had sufficient information to decide the case.<sup>83</sup>

<b>Percent of Caseload Subject to Arbitration</b>	<b>Maricopa (<i>n</i> = 1564)</b>	<b>Pima (<i>n</i> = 179)</b>	<b>Other Counties (<i>n</i> = 92)</b>	<b>Statewide Total (<i>n</i> = 1856)</b>
none	49%	30%	29%	47%
1% - 9%	23%	31%	26%	23%
10% or more	20%	29%	36%	30%

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<sup>82</sup>  $F(2, 1832) = 3.66, p < .05$ .

<sup>83</sup> Area:  $r(1403) = .272, p < .001$ ; procedures:  $r(1395) = .179, p < .001$ ; information:  $r(1400) = .079, p < .01$ .

Lawyers who responded to this section of the survey were about equally likely to have a civil litigation as have a transactional/criminal law practice.<sup>84</sup> Regardless of the type of case they arbitrated, arbitrators in civil litigation practice were more likely than those in “mixed” practice areas, who in turn were more likely than those in transactional/criminal practice to say that they were familiar with the area of law in the case they arbitrated, they were familiar with arbitration procedures, and they had sufficient information to decide the case.<sup>85</sup>

<b>General Area of Practice</b>	Maricopa ( <i>n</i> = 1321)	Pima ( <i>n</i> = 167)	Other Counties ( <i>n</i> = 82)	Statewide Total ( <i>n</i> = 1585)
transactional/criminal	38.8%	42.5%	45.1%	39.6%
mixed	15.9%	15.6%	17.1%	16.0%
civil litigation	45.3%	41.9%	37.8%	44.4%

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<sup>84</sup> “Civil litigation” practice included general civil litigation, tort or personal injury, or business or commercial litigation. “Mixed” practice included family, bankruptcy, or labor and employment. “Transactional/criminal” practice included transactional, tax, criminal, Workers’ Comp, real estate, or probate, estate, and trust. For an additional explanation of this categorization, *see supra* Section IV.B.1. There were no statistically significant differences among the counties ( $\chi^2(4) = 2.52, p = .641$ ).

<sup>85</sup> Area:  $F(2, 1222) = 114.90, p < .001$ ; procedures:  $F(2, 1214) = 80.60, p < .001$ ; information:  $F(2, 1217) = 25.46, p < .001$ . These findings are discussed in more detail, *infra*.

The largest proportion of lawyers who responded to this section of the survey, almost half in Maricopa County and a majority in Pima County and the other counties, had a solo or small firm practice.<sup>86</sup>

Type of Practice	Maricopa (n = 1625)	Pima (n = 187)	Other Counties (n = 94)	Statewide Total (n = 1927)
solo	24.2%	38.0%	40.4%	26.4%
small firm	23.3%	27.8%	36.2%	24.3%
medium firm	14.0%	14.4%	5.3%	13.6%
large firm	17.5%	9.6%	1.1%	15.9%
corporate counsel	8.4%	3.7%	1.1%	7.6%
government / agency	10.8%	5.3%	14.9%	10.5%
other	1.7%	1.1%	1.1%	1.6%

Thus, lawyers who responded to the arbitrator section of the survey appeared to differ from lawyers who responded to the counsel section in terms of their area and type of practice. Arbitrators were less likely to be in civil litigation practice; were more likely to have a large firm, corporate, or government/agency practice; and were less likely to have cases subject to arbitration than were lawyers who represented clients in arbitration.<sup>87</sup>

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<sup>86</sup> Arbitrators in Maricopa County were less likely to have a solo or small firm practice than were lawyers in Pima County, who in turn were less likely than arbitrators in the other counties ( $\chi^2(12) = 69.34, p < .001$ ).

<sup>87</sup> See *supra* Section IV.B.1.

Of the lawyers who responded to this section of the survey, the largest proportion had served as an arbitrator in a tort motor vehicle case, and the second largest proportion had served in a contract case.<sup>88</sup>

Type of Case Arbitrated	Maricopa (n = 1624)	Pima (n = 188)	Other Counties (n = 93)	Statewide Total (n = 1998)
tort motor vehicle	55.5%	55.3%	47.3%	55.4%
tort non-motor vehicle	11.6%	16.0%	16.1%	12.3%
contract	28.1%	27.1%	32.3%	27.9%
other	4.9%	1.6%	4.3%	4.5%

In Maricopa County, the composition of cases that the survey respondents had arbitrated was similar to the composition of cases assigned to arbitration in court data.<sup>89</sup> In Pima County, however, a larger proportion of survey respondents were involved in contract cases and a smaller proportion were involved in tort motor vehicle cases than the composition of cases assigned to arbitration in the court data.<sup>90</sup> Because there were a number of statistically significant differences in arbitrators' experiences depending on whether they had arbitrated a contract or tort motor vehicle case, the responses of Pima County arbitrators reported here might be different than if the survey respondents had been more representative of the composition of cases assigned to arbitration. Specifically, lawyers who arbitrated a contract case, compared to those who arbitrated a tort motor vehicle case, were more likely to report that: they were asked to rule on a pre-trial motion other than for a continuance,<sup>91</sup> they thought that one or both parties did not participate in good faith,<sup>92</sup> and they said they spent more time on the case.<sup>93</sup> Lawyers who arbitrated a tort non-motor vehicle case generally gave responses that were in between those for contract and tort motor vehicle cases.

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<sup>88</sup> There were no statistically significant differences among the counties ( $\chi^2(6) = 9.57, p = .14$ ).

<sup>89</sup> Based on data from the court, 54% of cases assigned to arbitration were tort motor vehicle and 30% were contract. *See supra* Section III.A.3.

<sup>90</sup> Based on data from the court, 70% of cases assigned to arbitration were tort motor vehicle and 14% were contract. *See supra* Section III.B.2.

<sup>91</sup> Contract, 50%; tort non-motor vehicle, 41%; tort motor vehicle, 25% ( $\chi^2(2) = 103.17, p < .001$ ).

<sup>92</sup> Contract, 17%; both tort motor vehicle and tort non-motor vehicle were 8% ( $\chi^2(2) = 20.13, p < .001$ ).

<sup>93</sup> The average total hours spent were 11 for contract, 9 for tort non-motor vehicle, and 8 for tort motor vehicle cases ( $F(2, 1363) = 12.71, p < .001$ ).

## **2. Arbitrators' Familiarity with the Law and Arbitration Procedures**

Among the arbitrators in Pima County who held a hearing or heard a pre-trial motion, the largest proportion were very familiar with the area of law in the case. By contrast, the largest proportion of arbitrators in Maricopa County and the other counties were only somewhat familiar with the area of law. Twice as many arbitrators in Pima County as in Maricopa County were very familiar with the subject area; an intermediate number of arbitrators in the other counties were very familiar.<sup>94</sup> Notably, almost one-fourth of Maricopa County arbitrators said they were not at all familiar with the area of law, whereas few arbitrators in Pima County and the other counties were not at all familiar. These differences among the counties generally parallel differences in their practices regarding the assignment of arbitrators to cases based on subject matter expertise: Maricopa County does not match based on subject matter, Pima County generally does, and some of the other counties match while others do not.<sup>95</sup>

<b>Arbitrator's Familiarity with the Area of Law</b>	<b>Maricopa (n = 1216)</b>	<b>Pima (n = 164)</b>	<b>Other Counties (n = 77)</b>	<b>Statewide Total (n = 1526)</b>
not at all	22.9%	8.5%	2.6%	20.4%
somewhat	46.9%	29.9%	54.5%	45.3%
very familiar	30.3%	61.6%	42.9%	34.3%

The following comments illustrate how arbitrators feel when they are not familiar with the subject matter in the case, or with civil litigation more generally.<sup>96</sup>

As an attorney who has only practiced in criminal law, I felt totally out of touch with both the issues and the procedures. Almost all of the time spent was in self-education on basic civil and contract law. I felt akin to a podiatrist being called upon to perform open-heart surgery.

I have an office practice and do not do litigation. . . . I certainly didn't know how to deal with objections based on rules of evidence relating to experts, medical records, etc. It was

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<sup>94</sup>  $F(2, 1454) = 35.42, p < .001$ . The assessments of arbitrators in Pima County were not statistically significantly different from those in counties other than Maricopa.

<sup>95</sup> See *supra* Section II.B.3.

<sup>96</sup> For additional comments about the arbitrators' knowledge of the subject matter, see *supra* Section IV.B.3, and see *infra* Section and IV.D.3.

embarrassing (and probably disconcerting to the parties) when the two attorneys argued some point of law, citing relevant cases by name (obviously the lead cases on the point), and I had no idea what they were talking about.

I do not feel competent to act in the capacity I am forced to play in this system. I do not know the rules of evidence, I have no experience ruling on objections, and I have no background in the areas of law I must address. This is not fair to the litigants and it is not fair to me.

Because I do not do litigation practice it was tough to rule on evidence disputes and procedural issues in the arbitration hearing and to deal with other issues (absent parties, etc.)--no experience with how such matters are usually handled.

Regardless of the type of case they had arbitrated, arbitrators in civil litigation practice were more likely to say that they were very familiar with the area of law involved in the case (58%), and were less likely to say they were not at all familiar with the area (7%), than were lawyers in transactional/criminal practice (20% were very familiar and 29% were not at all familiar).<sup>97</sup> This is not surprising, given that most arbitration cases involved tort or contract claims, which fall within “civil litigation practice”.<sup>98</sup>

The interaction of the type of case arbitrated and the arbitrators’ more specific practice area is of interest in exploring how the courts could maximize arbitrators’ knowledge of the area of law when assigning arbitrators to cases.<sup>99</sup> Arbitrators whose primary practice involved personal injury, general civil litigation, criminal, or bankruptcy cases said they were more familiar with the area of law when they arbitrated tort motor vehicle cases than contract cases. Conversely, arbitrators whose primary practice area was business litigation, family, tax, real estate, transactional, probate, or employment, felt more familiar with the area of law when they arbitrated contract cases than tort motor vehicle cases. In most practice areas, arbitrators’ familiarity with tort non-motor vehicle cases fell between these two other case types.

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<sup>97</sup>  $F(2, 1222) = 114.90, p < .001$ . Twenty-three percent of arbitrators in “mixed” practice were very familiar with the area of law and 19% were not at all familiar.

<sup>98</sup> See *supra* Sections III.C.1, IV.B.1.

<sup>99</sup> The type of case arbitrated and the specific practice area had a statistically significant combined effect on arbitrators’ familiarity with the area of law ( $F(24, 1228) = 13.37, p < .001$ ).

A majority of arbitrators who held a hearing or heard a pre-trial motion felt they had sufficient information about the facts and the law to reach an informed decision in the case. Arbitrators in Maricopa County were less likely to feel they had sufficient information, and were more likely to say they needed more information about the law, than were arbitrators in Pima County and the other counties.<sup>100</sup>

<b>Arbitrators Felt They Had Sufficient Information</b>	<b>Maricopa (n = 1207)</b>	<b>Pima (n = 166)</b>	<b>Other Counties (n = 77)</b>	<b>Statewide Total (n = 1521)</b>
no	4.2%	2.4%	2.6%	4.0%
somewhat; needed more info re facts	8.4%	4.8%	6.5%	8.2%
somewhat; needed more info re law	14.5%	6.0%	2.6%	13.0%
yes, had sufficient information	72.9%	86.7%	88.3%	74.8%

The following comments provide some insight into why arbitrators did, or did not, feel they had sufficient information.

The only reason I had sufficient information was that I did my own homework – if I had to rely on counsel only, I would not have. Unless you practice in the area, each time I have an arbitration I have to refresh on the rules of evidence, which can be time consuming.

In an area in which I have no expertise, one attorney told me “there was a whole body of law out there” (none of which he provided) and expected that I would apply it.

I requested the parties to provide me a memorandum of law in regard to an area of law I was not that familiar with, i.e. security law. This assisted greatly in my being able to make rulings in the case

To be comfortable with my decision, I had to do some research of my own into the law to reach a decision.

I knew nothing about the rules of evidence that they argued about and so my rulings were common sense.

Neither party, and especially the plaintiff’s attorney, presented adequate factual info (i.e., damages) or the law.

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<sup>100</sup>  $F(2, 1447) = 7.00, p < .01$ . The assessments of arbitrators in Pima County were not statistically significantly different from those in counties other than Maricopa.

I felt it odd that the attorneys assumed that I would know anything about topics such as the reasonableness of the time/duration of medical treatment and accident reconstruction.

Neither of the parties, including the Defendant who was represented by counsel, complied with my written request to file briefs before the hearing. As a result, I had to spend 6 hours the night before the hearing researching the law to understand the elements of the torts alleged.

A basic statement of the legal basis of liability and a little argument on the issue would have saved me time and anguish.

I practice in a specialized area (intellectual property) in a national practice. I did not feel qualified to address the purely state law issues, and I did not have the time or resources to conduct the necessary legal research to gain the level of competence.

Regardless of the type of case they arbitrated, arbitrators in civil litigation practice were more likely to say that they had sufficient information on the facts and the law to decide the case than were arbitrators in transactional/criminal practice (86% vs. 68%).<sup>101</sup> Again, this is not surprising given that most arbitration cases involved tort or contract claims, which fall in the “civil litigation” practice area. The type of case the arbitrators heard did not affect whether they felt they had enough information to decide the case.<sup>102</sup> However, arbitrators who were very familiar with the area of law involved in the case were more than twice as likely to say they had sufficient information to reach an informed decision than were arbitrators not at all familiar with the subject matter (90% vs. 42%).<sup>103</sup> These findings and the prior comments suggest that if the arbitrators were not familiar with the substantive area, they either had to do their own research or request counsel to provide more information on the law in order to feel adequately informed to decide the case.

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<sup>101</sup>  $F(2,1217) = 25.46, p < .001$ . Seventy-six percent of arbitrators in “mixed” practice had sufficient information.

<sup>102</sup> Neither case type by itself ( $F(2,1173) = .106, p = .900$ ) nor in interaction with practice area ( $F(4, 1173) = 1.37, p = .243$ ) affected whether lawyers felt they had sufficient information. A similar pattern was seen when using the specific practice areas.

<sup>103</sup>  $\chi^2(6) = 319.50, p < .001$ . Among arbitrators who were somewhat familiar with the area of law, 78% felt they had sufficient information to decide the case. Arbitrators’ ratings of their familiarity with the subject matter in the case, whether they had sufficient information to decide the case, and whether they had sufficient understanding of arbitration procedures to conduct a hearing were all related ( $r$ ’s of .38 to .42,  $p$ ’s  $< .001$ ), probably reflecting the arbitrators’ area of practice.



A majority of arbitrators felt they had sufficient information about arbitration procedures to conduct an adequate hearing. Maricopa County arbitrators were less likely to feel they had sufficient information about arbitration procedures than were arbitrators in Pima County and the other counties.<sup>104</sup>

<b>Arbitrator's Familiarity with Arbitration Procedures</b>	<b>Maricopa (n = 1208)</b>	<b>Pima (n = 166)</b>	<b>Other Counties (n = 76)</b>	<b>Statewide Total (n = 1518)</b>
no	5.5%	1.8%	0%	5.1%
somewhat; needed more info	17.5%	9.6%	14.5%	16.8%
yes, had sufficient info	76.9%	88.6%	85.5%	78.1%

Arbitrators in civil litigation practice were more likely to say they had enough information on arbitration procedures to conduct an adequate hearing than were lawyers in transactional/criminal practice (95% vs. 66%).<sup>105</sup> This difference is not surprising, as it parallels the proportion of the caseload subject to arbitration in the different practice areas.<sup>106</sup> Some comments suggested that arbitrators were concerned not only about their lack of familiarity with arbitration procedures but also with the rules of civil procedure more generally.<sup>107</sup>

As a transactional attorney, rules and procedures relating to arbitration are unfamiliar to me. I spend much more time preparing for the proceeding than my litigation colleagues. I'm also not sure that the parties are well served by having an arbitrator without sufficient experience.

Guidance on the procedure of the hearing would be helpful. Arbitration clerk is totally unhelpful on questions regarding procedure.

I sometimes have procedural questions. However, the arbitration desk was unable to answer my question because the people answering are not trained to answer those questions.

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<sup>104</sup>  $F(2, 1447) = 7.92, p < .001$ . The assessments of arbitrators in Pima County were not statistically significantly different from those in counties other than Maricopa.

<sup>105</sup>  $\chi^2(4) = 146.72, p < .001$ . Eighty-five percent of arbitrators in a "mixed" practice area were very familiar with arbitration procedures.

<sup>106</sup> See *supra* Section IV.B.1.

<sup>107</sup> For additional comments about the arbitrators' knowledge of, or training in, arbitration procedures, see *supra* Section IV.B.3, and see *infra* Section and IV.D.3.

My lack of knowledge of civil procedure makes me an incompetent arbitrator.

The Court Clerk did not provide much help, other than referring me to the blank forms in the packet that was sent. When I called the State Bar, no one could answer any questions about the arbitration process or the role I was to play. I wanted to find out HOW to conduct an arbitration hearing, and there was no information available. Very unorganized and disappointing for a "mandatory" program.

### **3. Arbitrators' Tasks, Time Involvement, and Compensation**

Among the arbitrators who scheduled a hearing,<sup>108</sup> close to half said scheduling the hearing was somewhat difficult, and a small number said it was very difficult. Arbitrators in Pima County reported less difficulty scheduling a hearing than did arbitrators in Maricopa County.<sup>109</sup>

<b>Arbitrator Had Difficulty Scheduling Hearing</b>	<b>Maricopa (n = 1546)</b>	<b>Pima (n = 183)</b>	<b>Other Counties (n = 91)</b>	<b>Statewide Total (n = 1910)</b>
not at all	37.9%	50.3%	47.3%	39.9%
somewhat	48.8%	43.2%	41.8%	47.3%
very difficult	13.3%	6.6%	11.0%	12.8%

Following are comments that illustrate the problems had with scheduling a hearing.

The arbitrator spends too much time getting agreement for hearing dates because the arbitrator has no real power. The weak side will always delay.

It is always VERY difficult to get these arbitration hearings scheduled – both plaintiff and defendant attorneys are not very helpful and frequently want continuances for other than good cause. Attorneys do not seem concerned about the mandatory deadlines that the arbitrator has to deal with.

The lawyers do not extend the same courtesy to the arbitrator regarding scheduling that they show the court. The procedures could provide suggestions to stream line scheduling -- that is one of the biggest time drains.

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<sup>108</sup> Five percent or fewer of the arbitrators in each county who responded to this section of the survey did not schedule a hearing. We do not know if this is representative of the actual percentage of arbitration cases settled or dismissed before a hearing date is set because the docket data did not have complete information on the hearing date. *See supra* Sections III.A.4.h, III.B.3.h. We suspect, however, that the percentage reported here underestimates the actual percentage because, when asked to reflect on the case they most recently arbitrated, arbitrators might be less likely to recall a case in which they did not schedule a hearing than one in which they did.

<sup>109</sup>  $F(2, 1817) = 7.64, p < .001$ . Arbitrators in the other counties did not differ statistically significantly from arbitrators in either Pima or Maricopa Counties.

The Defendant's attorney never responded to my calls or my letters seeking to set a convenient hearing.

My secretary had to reschedule at the request of one party or the other at least 4 or 5 times.

I've already spent over 20 hours on this case, the parties still have not agreed on a hearing date.

Every hearing has been set on an agreed date. Every time a change is asked for at the last minute.

I scheduled one, after input from the parties, and they asked for something like a 6 month continuance. I told them that was too long under the rules, but they wouldn't work with my secretary to come up with a new date.

Currently, in Pima County, when the Court sends the Notice of the selected arbitrator, it contains ONLY the NAMES of the parties or their attorneys. I suggest that the Notice should also contain the respective party's, or the party's attorney's, ADDRESS and PHONE NUMBER.

The court provided no information whatsoever to enable me to contact the participants. When I contacted the arbitration office I was told that I would have to somehow obtain the addresses for the litigants, one of which was an individual appearing pro se who had no listing in the telephone directory. Yet, I was under orders to schedule a hearing within a fixed period or be in violation of the court's rules. Does that make any sense to you?

I find that the attorneys, their paralegals and their clients routinely disregard correspondence from the arbitrator and deadlines set by the arbitrator. There are constant battles over continuances. Then I get the nasty minute entry from the assigned judge who is reprimanding me for not acting. Or I am about to issue an order that declines a continuance and the assigned judge issues a minute entry granting the continuance! The matters typically consume hours and hours of unproductive staff time spent on the telephone and calendars.

In addition to difficulties scheduling the hearing, counsel often did not notify the arbitrator if the case settled before the hearing date.

The parties settled the day before the arbitration, after I had read all the materials and prepared for it. I would like to see some kind of rule imposing a mild penalty if the parties cancel an arbitration for settlement or similar reasons less than 2 – 3 days in advance of the hearing.

The case settled immediately before the hearing, after I had cancelled a vacation in order to hold it at the only time that the parties would agree to. They failed to inform me of their settlement negotiations until I contacted them regarding the failure to submit the required joint statement.

Both parties failed to appear for the arbitration hearing. I had allocated several hours of my time and reserved a conference room for the hearing. My staff contacted the parties and was informed that the case had settled. No one bothered to inform me that the matter had been settled.

One out of three arbitrators said they were asked to rule on one or more pre-trial motions other than for a continuance.<sup>110</sup>

<b>Arbitrator Ruled on Pre-trial Motion</b>	<b>Maricopa (n = 1622)</b>	<b>Pima (n = 187)</b>	<b>Other Counties (n = 93)</b>	<b>Statewide Total (n = 1995)</b>
No	66.1%	63.1%	62.4%	66.0%
Yes	33.9%	36.9%	37.6%	34.0%

Some arbitrators noted that judges were not clear that arbitrators were to decide certain motions, and arbitrators who did not have a civil litigation practice commented on the difficulties they had ruling on motions.

For me the most confusing part is the pre-trial motions. As a non-litigator, I can be a finder of facts but knowing the proper procedures to apply to motions etc is very difficult. In some cases the motions seem to be directed to me and are then ruled on by the judge, which only adds to the confusion.

I am not a litigator and am not comfortable making rulings on objections and motions.

The court wasted much of my time on this case by ruling on many pre-trial motions that I had already ruled upon and that were supposed to be within the authority of the arbitrator and not the judge.

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<sup>110</sup> There were no statistically significant differences among the counties ( $F(2, 1899) = .560, p = .571$ ).

Although the survey did not specifically ask whether the parties had submitted their pre-hearing statements, several arbitrators commented on this issue.

I have had difficulty in getting the parties to submit their arbitration statements in a timely manner. As I recall, there is no provision in the rules for sanctions for failure to comply.

I have rarely received any pre-hearing statements in spite of the fact that my initial scheduling letter specifically requires it.

There should be some way to permit the arbitrator to require the attorneys to follow the rules. For example, in almost every arbitration I have conducted, I have had attorneys argue with me about doing a pre-hearing statement, which is necessary so that I am prepared for the hearing.

Among the arbitrators, 81% in Maricopa County, 94% in Pima County, and 87% in the other counties held a hearing. This is a substantially larger proportion of cases that went to a hearing than observed in the court data.<sup>111</sup> This is likely because, when asked to recall the most recent case they arbitrated, arbitrators might focus on cases in which they held a hearing. To minimize potential problems of interpretation due to the over-representation among survey respondents of arbitrators who held a hearing, we report the total amount of time arbitrators spent on a case separately for those who held a hearing and those who did not.

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<sup>111</sup> In most counties, roughly one-third to two-thirds of cases assigned to arbitration concluded before the hearing. *See supra* Section III.C.

Of those arbitrators who held a hearing or heard a pre-trial motion and felt they could discern whether the parties were participating in good faith, most felt that both parties had participated in good faith. Pima County arbitrators were more likely than arbitrators in the other counties, who in turn were more likely than arbitrators in Maricopa County, to think that both parties had participated in good faith.<sup>112</sup>

<b>Arbitrator Thought Parties Participated in Good Faith</b>	<b>Maricopa (n = 1094)</b>	<b>Pima (n = 159)</b>	<b>Other Counties (n = 75)</b>	<b>Statewide Total (n = 1391)</b>
only plaintiff	8.3%	1.9%	5.3%	7.6%
only defendant	3.5%	.6%	2.7%	2.9%
both parties	88.2%	97.5%	92.0%	89.4%

Arbitrators' comments, however, suggested that there were problems that were short of "bad faith."

While not amounting to bad faith, one side plainly didn't prepare much or put substantial effort into the process. I inferred that the party knew from the outset that it would appeal.

The defendant put on no defense, and made no effort to challenge the plaintiff's damage claim.

I have served quite a bit & more commonly see unprepared attorneys going thru the motions (barely) but not providing the facts or law needed to resolve the case. I think they show up because they have to but either expect me to do their job or plan on appealing if it doesn't go their way.

In general, my experience has been that the insurance companies have not acted in good faith in defending the cases. On the flip side of things I have been the arbitrator in at least one case where plaintiff counsel's office sent an associate to the hearing who had no knowledge of the facts and little understanding of the law.

The parties appeared to be going through the exercise, although there was no demonstrable bad faith, in the expectation that one or the other would appeal to get their "real" trial.

I would not say that parties participate in bad faith, but it is disturbing to find that in most arbitrations I have handled that went to hearing, I was more prepared for the hearing than the lawyers representing the parties. This problem is aggravated by the availability of de novo

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<sup>112</sup>  $\chi^2(4) = 13.30, p < .05$ .



review by the Superior Court.

Defense counsel do not present their best case at arbitration because they intend to appeal and don't want to worry about doing better [on appeal] to avoid sanctions. Typically, this means they don't hire and use experts for arbitration which they use at trial. One way to eliminate this problem is that a party should not be permitted to use new expert witnesses or their records at trial.

The requirements to participate in "good faith" in arbitration should be more stringent. Often the parties don't show up, or insurance defense firms do little on the case other than showing up to arbitration knowing they will appeal the case anyway.

There should be more stringent penalties for failing to participate in good faith from both a substantive and procedural standpoint; many auto insurers use this as a means of discovery.

Because the plaintiff did not participate in good faith, this arbitration took a substantial amount of time both before and after the arbitration. Last minute continuances, frivolous motions and the non-appearance of the plaintiff (only his counsel showed up) were responsible for the excessive amount of time.

In all of the tort motor vehicle cases I have handled, to my knowledge, the rulings have been appealed even if de minimis damages were awarded. In my view, when an insurance company defendant does that, it has not approached the matter in good faith.

I seem to always be called for car accident cases involving insurance companies. . . , who do not negotiate in good faith. I feel like the process is simply a way for insurance companies to grind folks down.

Parties tend to dump on the arbitrator disclosure statements, depositions and exhibits, all of which are admissible by Rule, and offer little testimony to explain it. It's sort of "Here it is, you figure it out." Whether that's good faith or not is debatable.

If Arbitration is going to work - if citizens are going to have confidence and believe in the integrity of Arbitration - then their counsel should come to arbitration prepared to present all the facts, law and argument they've got. . . . Citizens can trust Arbitration decisions when they are given full investment by the attorneys conducting them.

I sanctioned an attorney for egregious conduct in the last arbitration. It was never paid. The judge should follow up.

In the majority of those cases, while the parties participated, I had the impression that no matter how I ruled, the losing party would appeal and so I felt that the hearing and time spent preparing were a waste of time.

The single largest proportion of arbitrators, about half, said their support staff spent one to two hours<sup>113</sup> on the most recent arbitration case in which they served as an arbitrator.<sup>114</sup> Approximately one-fourth said their support staff spent three to eight hours on the case. Few arbitrators said their support staff spent more than eight hours on the case, but some reported that their staff spent up to 50 hours in Maricopa County, 42 hours in Pima County, and 30 hours in the other counties. As one arbitrator commented, “It requires support staff time to run conflict checks, docket and set up the file, and then try to communicate with the parties to schedule hearings and pre-hearing motions.”

<b>Hours Spent by Arbitrator’s Support Staff</b>	<b>Maricopa (<i>n</i> = 1550)</b>	<b>Pima (<i>n</i> = 173)</b>	<b>Other Counties (<i>n</i> = 91)</b>	<b>Statewide Total (<i>n</i> = 1909)</b>
0 hours	15%	13%	22%	15%
1 - 2 hours	51%	61%	47%	51%
3 - 4 hours	17%	14%	16%	17%
5 - 8 hours	9%	8%	7%	9%
more than 8 hours	8%	5%	7%	8%

Arbitrators in cases in which a hearing was not held reported their support staff spent less time on the case by about one hour, on average.<sup>115</sup>

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<sup>113</sup> For this and subsequent questions about the amount of time spent, arbitrators were asked to answer in whole hours rather than fractions of an hour. Accordingly, responses of “one hour” could include lengths of time shorter than an hour but more than “zero,” as well as intervals longer than one hour but less than two hours. Based on lawyers’ comments, some who entered “0 hours” might not have had support staff.

<sup>114</sup> There were no statistically significant differences among the counties ( $F(2, 1811) = .58, p = .56$ ).

<sup>115</sup>  $F(1, 1683) = 8.57, p < .01$ . Twenty-three percent of arbitrators who did not hold a hearing, compared to 13% who did, said their support staff spent no time on the case.

A majority of arbitrators spent one or two hours on their most recent case prior to a hearing. Fewer than one-fourth of the arbitrators in Pima County, but over one-third in all other counties, spent three to five hours on the case. Few arbitrators spent more than eight hours on the case before the hearing, but some spent up to 75 hours in Maricopa County, 22 hours in Pima County, and 40 hours in the other counties. Pima County arbitrators spent less time on the case before the hearing than did arbitrators in Maricopa County and the other counties.<sup>116</sup> Not surprisingly, arbitrators who ruled on a motion other than for a continuance spent more time on the case prior to a hearing (on average, almost two hours more) than did arbitrators who did not rule on a motion.<sup>117</sup> Arbitrators in cases in which no hearing was held spent less time on the case prior to the hearing, but only about one hour less, on average.<sup>118</sup>

<b>Hours Arbitrator Spent Before Hearing</b>	<b>Maricopa (n = 1585)</b>	<b>Pima (n = 180)</b>	<b>Other Counties (n = 90)</b>	<b>Statewide Total (n = 1946)</b>
0 hours	1%	1%	2%	1%
1 hour	25%	44%	21%	27%
2 hours	30%	29%	38%	30%
3 hours	16%	12%	17%	15%
4 hours	8%	4%	6%	8%
5 - 8 hours	13%	5%	13%	12%
more than 8 hours	8%	3%	4%	7%

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<sup>116</sup>  $F(2, 1852) = 5.54, p < .01$ . The time spent by arbitrators in Maricopa County did not differ statistically significantly from the time spent by arbitrators in counties other than Pima County.

<sup>117</sup>  $F(1, 1929) = 96.94, p < .001$ .

<sup>118</sup>  $F(1, 1745) = 11.31, p < .01$ . Sixty-six percent of arbitrators in cases in which no hearing was held, compared to 45% in cases that went to hearing, spent less than three hours on the case before the hearing.

Among the arbitrators who held a hearing, a majority in Maricopa (59%) and Pima (65%) Counties, and close to half in the other counties (47%), spent two or three hours in the hearing. Few arbitrators spent an hour or less in the hearing. However, approximately one-third of arbitrators in Pima and Maricopa Counties, and almost half of arbitrators in other counties, spent more than three hours in the hearing. Pima and Maricopa County arbitrators reported spending less time in the hearing than did arbitrators in the other counties.<sup>119</sup> The longest amount of time arbitrators spent in a hearing was 20 hours in Maricopa County and 16 hours in Pima County and the other counties.

<b>Hours Arbitrator Spent During Hearing</b>	<b>Maricopa (n = 1148)</b>	<b>Pima (n = 162)</b>	<b>Other Counties (n = 72)</b>	<b>Statewide Total (n = 1448)</b>
1 hour	7.1%	4.9%	5.6%	6.8%
2 hours	28.8%	34.6%	25.0%	29.6%
3 hours	30.7%	30.2%	22.2%	30.1%
4 hours	18.7%	17.3%	20.8%	18.7%
5 hours	6.9%	6.8%	6.9%	6.7%
6 or more hours	8.0%	6.1%	19.5%	8.1%

A majority of arbitrators spent one or two hours after the hearing on their most recent arbitration case.<sup>120</sup> Few arbitrators spent more than four hours on the case after the hearing; the longest time was 45 hours in Maricopa County, 12 hours in Pima County, and 10 hours in the other counties.

<b>Hours Arbitrator Spent After Hearing</b>	<b>Maricopa (n = 1127)</b>	<b>Pima (n = 162)</b>	<b>Other Counties (n = 72)</b>	<b>Statewide Total (n = 1417 )</b>
0 hours	.7%	1.9%	1.4%	1.0%
1 hour	42.9%	55.8%	43.1%	44.5%
2 hours	29.9%	22.7%	34.7%	29.3%
3 hours	11.8%	9.7%	6.9%	11.1%
4 hours	6.7%	3.2%	1.4%	6.1%
5 or more hours	8.2%	6.2%	12.6%	8.0%

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<sup>119</sup>  $F(2, 1379) = 4.12, p < .05$ .

<sup>120</sup> There were no statistically significant differences among the counties ( $F(2, 1350) = 2.16, p = .116$ ).

When all the time spent on a case was summed for arbitrators who held a hearing (*i.e.*, time before, during, and after the hearing), approximately half of the arbitrators in each county (50% to 56%) spent five to eight hours on the case. Relatively few arbitrators spent four or fewer hours on the case (10% to 21%), while a substantial minority spent more than eight hours on the case (24% to 40%). Pima County arbitrators spent less total time on cases that went to hearing than did arbitrators in Maricopa County and the other counties.<sup>121</sup> The longest total time arbitrators spent on a case that went to a hearing was 125 hours in Maricopa County, 35 hours in Pima County, and 61 hours in the other counties.<sup>122</sup>

<b>Total Hours Arbitrator Spent in Cases with a Hearing</b>	<b>Maricopa (n = 1127)</b>	<b>Pima (n = 154)</b>	<b>Other Counties (n = 72)</b>	<b>Statewide Total (n = 1417)</b>
2 - 4 hours	11%	21%	10%	12%
5 hours	12%	20%	12%	13%
6 hours	14%	18%	11%	14%
7 hours	12%	6%	17%	12%
8 hours	12%	12%	10%	12%
9 - 14 hours	27%	17%	27%	26%
15 or more hours	12%	7%	13%	12%

Among arbitrators who held a hearing or ruled on a motion, the arbitrators' familiarity with the area of law and with arbitration procedures was related to how much time the arbitrator spent on the case. Arbitrators who were not at all familiar with the area of law involved in the case spent, on average, over three hours more on the case than did arbitrators who were very familiar with the area.<sup>123</sup> Arbitrators who said they did not have sufficient information about the facts or the law to reach an informed decision in the case spent, on average, over five hours more on the case than did arbitrators who felt they

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<sup>121</sup>  $F(2, 1350) = 4.42, p < .05$ . Arbitrators in Maricopa County did not differ statistically significantly from those in counties other than Pima County.

<sup>122</sup> The longest time arbitrators spent on cases tended to be extreme. To put that into perspective, the second and third longest amounts of time, respectively, that arbitrators spent on cases that went to a hearing were 64 and 63 hours in Maricopa County; 32 and 22 hours in Pima County; and 36 and 20 hours in the other counties.

<sup>123</sup>  $F(2, 1408) = 17.07, p < .001$ .

had sufficient information.<sup>124</sup> And arbitrators who said they did not have sufficient information about arbitration procedures to conduct an adequate hearing spent almost three hours more on the case, on average, than did arbitrators who felt they had enough information about arbitration procedures.<sup>125</sup> For each of these three measures, arbitrators who were somewhat familiar tended to spend an intermediate amount of time on the case compared to those who were very or not at all familiar. In addition, arbitrators who were not familiar with the area of law or arbitration procedure said their support staff spent more time on the case than did those who were very familiar.<sup>126</sup>

In cases that did not have a hearing, 66% of the arbitrators in Maricopa County and all of the arbitrators in Pima County and the other counties spent two hours or less on the case. In Maricopa County, one-third of arbitrators spent from three to twenty-five hours on cases that did not have a hearing.<sup>127</sup>

In their comments, some lawyers felt that the time they spent on arbitration was a greater burden due to their type of practice, regardless of their familiarity with the law or procedures. Others commented that their time was wasted because the case was appealed.

Arbitration is very time consuming and does not take into account the burden of a public lawyer's caseload.

I am a sole practitioner working from my home. I have no staff so I have to handle everything including scheduling, picking up the file, arranging the hearing location, typing all notices and awards, and all contacts with counsel. This was a case involving 5 sets of parties and three separate counsel, so coordinating became somewhat cumbersome. I office in north central Phoenix and the file was in the Mesa clerk's office.

I am a rural Arizona sole practitioner who made less than \$30,000 last year. Being assigned as an arbitrator for a case is a financial disaster. It takes a great deal of staff time and a portion of my time which otherwise would be used to bring in money for my family.

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<sup>124</sup>  $F(2, 1409) = 21.79, p < .001$ .

<sup>125</sup>  $F(2, 1403) = 13.66, p < .001$ .

<sup>126</sup> Area:  $F(2, 1382) = 3.59, p < .05$ ; information:  $F(2, 1382) = 10.62, p < .001$ ; procedure:  $F(2, 1376) = 9.00, p < .001$ .

<sup>127</sup> There were no statistically significant differences among the counties ( $F(2, 126) = .89, p = .412$ ), probably due to the small number of survey respondents in cases in which no hearing was held.

I spent a great deal of time reviewing all kinds of medical records and . . . after an all afternoon hearing and my ruling the case still went to trial (or was supposed to as the defendant rejected the arbitration). I found it a total waste of my time and the time of the plaintiff who had to do the same thing twice.

The insurance company made it clear that they would be appealing any adverse decision – the whole process was pointless.

Among the arbitrators who held a hearing, a majority in Maricopa County did not submit an invoice for payment.<sup>128</sup> By contrast, a majority of arbitrators in Pima County and the other counties received \$75 for their service.<sup>129</sup> About as many arbitrators in Maricopa County assigned their fee to a charity or to the bar foundation (an option that generally was not easily available in the other counties) as received payment. Among arbitrators who received payment, few received more than \$75.<sup>130</sup>

<b>Payment Arbitrator Received for Service</b>	<b>Maricopa (n = 1130)</b>	<b>Pima (n = 161)</b>	<b>Other Counties (n = 70)</b>	<b>Statewide Total (n = 1426)</b>
\$75	17.9%	72.0%	61.4%	26.4%
more than \$75	.7%	6.2%	1.4%	1.3%
assigned to charity, bar foundation	19.7%	1.2%	1.4%	16.5%
did not submit invoice	61.7%	20.5%	35.7%	55.7%

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<sup>128</sup> Arbitrators may be compensated \$75 per day for time spent “in the hearing of the case,” including any fact-finding proceeding or oral argument on a dispositive motion. Ariz. R. Civ. P. 75(d), A.R.S. § 12-133(G).

<sup>129</sup> There were differences among the counties in whether arbitrators received compensation ( $\chi^2(6) = 307.93, p < .001$ ).

<sup>130</sup> Several government lawyers noted that they cannot accept compensation for their service, and said they assigned the payment to their office.

The following comments illustrate lawyers' views on the present compensation system.<sup>131</sup>

I never submit an invoice for payment. It would take more than \$75 of my time to do that.

The payment mechanism is ridiculous. The court should be able to make the compensation process simpler.

Asking me to spend 6 plus hours for \$75 is ridiculous.

The payment amounts are insulting.

The \$75 fee is a joke.

\$75 is really a slap in the face. Just sending out the initial letter requesting dates and times for the hearing is worth more than what is presently paid.

The \$75 compensation figure is absurd.

I filed the arbitration award and my request for payment as instructed to the Phoenix arbitration department 5/17/04. Apparently, it was a Mesa case. Phoenix did not send either to Mesa even though I received a date stamped copy of the award. Then, I received a 150 day order dated 5/26/04 and still no check. After many telephone calls and faxes of documents at my expense, Mesa still had to request the same information from Phoenix before sending me a check. The \$75 check did not cover my out of pocket expenses, and certainly none of the time expended on the hearing.

I have had several where I have put in numerous hours on pre-trial motions, etc. and then the case settles - I get no money for doing it since no hearing was held!

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<sup>131</sup> For additional views on how arbitrators should be compensated, *see infra* Section IV.D.3.



Arbitrators had a number of comments about aspects of arbitration that were not specifically addressed by survey questions, including wanting feedback on the outcome of the case, wanting greater help from the court, and describing problems *pro per* litigants posed.

I would greatly appreciate feedback regarding whether my work was substantially correct or resulted in a complete correction of the findings of fact and conclusions of law.

It would be helpful to be informed whether either of the parties appealed from the arbitration award; I have never been given that information in any case, and I therefore do not know whether what I do as an arbitrator makes any difference.

It would be nice to know how many of these are appealed to Superior Court so we would have a sense as to if we are wasting our time.

The Maricopa County Clerk's Office is not responsive to attorneys.

The court should send complaint and answer along with the appointment. Don't make me go down to the court to pick up files for this favor I'm doing for the court. Put a little effort into assisting arbitrators.

Retrieving the file only 4 days prior to the hearing (per instructed) does not give enough time to feel comfortable with the law that would be applicable to the case.

In both cases, I had a conflict of interest and submitted a request to be taken off the case. The arbitration department never informed me that my requests had been granted. I had to call several weeks after I submitted my requests to find out what the status of the case was. I found this to be unacceptable.

I have been assigned arbitration cases approximately every 3 to 4 months, while other colleagues in my office have never (despite over 10 years of membership in the State Bar) been called. I have tried to explain this injustice but I still keep getting assigned cases and others get nothing. Something is wrong with the system for assigning arbitrators.

We need to have locations available in secured areas of the courthouse. If County Judges are in need of security to hear these cases, lord knows we all are in such need.

The defendant was essentially *pro per* . . . . This involved extra work . . . .

I wrote an 8 page explanation for my decision as the defendants were *pro per*. This was to maintain confidence in the system for them. Arbitration is the only part of the system large numbers of the public will ever see. High quality here will save much on appeals.

Difficult arbitration, as defendant threatened to commit suicide if I found against her. Court involvement most appreciated.

The pro per litigants get taken advantage of even when one tries to be fair as an arbitrator. A system specially designed for these [tort motor vehicle] cases is in order.

Defendant was pro per; created ethical problem for me in explaining arbitration rules and procedures.

It has frequently been my experience that at least one party to the conflict being arbitrated is not represented by an attorney (and has little/no legal background). As a result, significant time is required by the arbitrator to educate the pro se litigant regarding the relevant law or legal rules/civil process to help ensure a fundamentally fair arbitration. This is extremely time consuming, especially when it is a pro se plaintiff with a legitimate and sympathetic claim that is poorly presented or fails to comply with civil procedures.

## D. General Views of Court-Connected Arbitration

The third section of the survey sought lawyers' views based on their overall direct experience with Arizona's mandatory court-connected arbitration program. Thus, any lawyer who had any direct experience with the arbitration program at any time was eligible to answer these questions. These questions sought lawyers' views on different structural aspects of the current arbitration program and on its effectiveness. A total of 2,515 lawyers responded to this section of the survey. Because it may be useful for policy makers to know whether and how the views of lawyers who represented clients in arbitration differed from the views of lawyers who served as arbitrators, below we present the views of these two groups separately for each item on which they differed.<sup>132</sup>

### 1. Respondents to This Section of the Survey

A majority of the lawyers who responded to this section of the survey said that some of their caseload was subject to arbitration, although only 10% had half or more of their caseload subject to arbitration. A sizeable proportion of lawyers who responded to this section had no cases subject to arbitration. Lawyers in Pima County were more likely to have at least some cases, as well as a larger proportion of their caseload, subject to arbitration than were lawyers in Maricopa County and the other counties.<sup>133</sup>

<b>Caseload Subject to Arbitration</b>	<b>Maricopa (n = 1920)</b>	<b>Pima (n = 255)</b>	<b>Other Counties (n = 154)</b>	<b>Statewide Total (n = 2362)</b>
none	46%	26%	38%	44%
1% to 9%	22%	25%	23%	22%
10% or more	31%	49%	39%	34%

As discussed *infra*, lawyers who had cases subject to arbitration tended to have different views about aspects of arbitration program structure and arbitrator service than

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<sup>132</sup> The views of the subgroup of lawyers who represented clients in arbitration showed the same pattern of differences among the counties as did the views of all lawyers who responded to this section of the survey. Therefore, we do not report the inter-county differences for that subgroup of lawyers.

<sup>133</sup>  $F(2, 2429) = 7.58, p < .01$ . The proportion of caseload subject to arbitration in Maricopa County did not differ from that in counties other than Pima County.

lawyers who did not have cases subject to arbitration; their views on arbitration's effectiveness, however, generally did not differ. Accordingly, the fact that the Pima County lawyers who responded to this section of the survey were more likely than lawyers in other counties to have cases subject to arbitration could contribute to differences among the counties in lawyers' views. Some, but not all, of the county differences in views changed or disappeared when looking separately at the views of lawyers with an arbitration caseload and those with no cases subject to arbitration. Thus, differences in the composition of survey respondents seemed to play a role in, but did not entirely explain, the pattern of observed differences in views among the counties.

Among the lawyers who had recently represented a client in a case assigned to arbitration, there were a few differences in views depending on whether the lawyer had represented the plaintiff or defendant and on the type of case in which they had most recently been involved in arbitration. On those views where differences were found, they are reported below.

Of the lawyers who responded to this section of the survey, approximately half in Maricopa and Pima Counties and one-third in the other counties had primarily a civil litigation practice. Conversely, over one-third of lawyers in Maricopa and Pima Counties and approximately half in the other counties had a transactional/criminal practice.<sup>134</sup>

<b>General Practice Area</b>	Maricopa ( <i>n</i> = 1597)	Pima ( <i>n</i> = 240)	Other Counties ( <i>n</i> = 131)	Statewide Total ( <i>n</i> = 1983)
transactional/criminal	37.2%	35.4%	48.9%	37.9%
mixed	14.7%	14.2%	18.3%	14.8%
civil litigation	48.2%	50.4%	32.8%	47.3%

Lawyers in civil litigation practice generally were more supportive of the current structure of the arbitration program than were lawyers who practiced in other areas.<sup>135</sup>

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<sup>134</sup>  $\chi^2(4) = 12.46, p < .05$ . See *supra* Section IV.A.1 for more details on this categorization.

<sup>135</sup> Differences in lawyers' views based on their general area of practice generally paralleled those between lawyers with cases subject to arbitration versus those with no cases subject to arbitration. More specifically, lawyers in civil litigation practice tended to have views similar to lawyers who had cases subject to arbitration, and lawyers primarily in transactional/criminal practice tended to have views similar to lawyers who did not have cases subject to arbitration. Lawyers in the "mixed" practice areas tended to have views that fell between the other two practice areas. Because of the large degree of overlap between lawyers' practice area and whether they had cases subject to arbitration, we do not

Thus, the few items on which the views of lawyers in Maricopa and Pima Counties differed from the views of lawyers in the other counties could in part reflect differences in the proportion of lawyers in different practice areas.

Among the lawyers who responded to this section of the survey, the largest proportion in each county had a solo or small firm practice. Lawyers in Maricopa County were less likely to have a solo practice, and more likely to have a large firm or corporate practice, than were lawyers in Pima County and the other counties.<sup>136</sup>

<b>Type of Practice</b>	<b>Maricopa (n = 1994)</b>	<b>Pima (n = 265)</b>	<b>Other Counties (n = 159)</b>	<b>Statewide Total (n = 2449)</b>
solo	22.6%	34.0%	34.6%	24.5%
small firm	23.0%	26.4%	32.7%	23.9%
medium firm	13.7%	17.4%	5.0%	13.4%
large firm	16.6%	10.6%	.6%	14.8%
corporate counsel	8.0%	4.2%	1.3%	7.1%
government /agency	13.5%	6.0%	24.5%	13.5%
other	2.6%	1.5%	1.3%	2.7%

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report differences by practice area.

<sup>136</sup>  $\chi^2(12) = 106.44, p < .001$ .

## **2. Views of Aspects of the Arbitration Program Structure**

A majority of lawyers felt that court-connected arbitration should remain mandatory for cases under the current jurisdictional limit. Pima County lawyers were more likely to feel arbitration use should remain mandatory than were lawyers in Maricopa County and the other counties.<sup>137</sup>

<b>Should Arbitration Use Remain Mandatory?</b>	<b>Maricopa (<i>n</i> = 1917)</b>	<b>Pima (<i>n</i> = 255)</b>	<b>Other Counties (<i>n</i> = 154)</b>	<b>Statewide Total (<i>n</i> = 2402)</b>
No	42.4%	23.9%	36.4%	40.0%
Yes	57.6%	76.1%	63.6%	60.0%

Lawyers with a caseload subject to arbitration were more likely to feel that arbitration use should remain mandatory (64%) than were lawyers with no cases subject to arbitration (55%).<sup>138</sup>

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<sup>137</sup>  $F(2, 2323) = 16.69, p < .001$ . Lawyers in Maricopa County did not differ statistically significantly from those in counties other than Pima County.

<sup>138</sup>  $\chi^2(1) = 17.71, p < .001$ .

Among lawyers who had cases subject to court-connected arbitration, a majority said they would at least sometimes recommend arbitration to clients if participation were made voluntary but the program otherwise remained the same. The single largest proportion of lawyers, just over one-third, said they would sometimes recommend arbitration to clients. As many or more lawyers said they would frequently or almost always recommend arbitration to clients as said they would never or seldom recommend it. Lawyers in Pima County were more likely (47%) than lawyers in Maricopa County (32%) and the other counties (38%) to say they would frequently or almost always recommend arbitration to clients.<sup>139</sup> Still, relatively few lawyers in all counties said they would almost always recommend arbitration to their clients if participation were made voluntary. It is interesting to note that while 64% of lawyers with cases subject to arbitration felt arbitration use should remain mandatory, far fewer said they would frequently or almost always recommend arbitration to clients.

<b>If Voluntary, Would You Recommend Arbitration to Clients?</b>	<b>Maricopa (<i>n</i> = 992 )</b>	<b>Pima (<i>n</i> = 187)</b>	<b>Other Counties (<i>n</i> = 93)</b>	<b>Statewide Total (<i>n</i> = 1283 )</b>
never	7.6%	3.7%	4.3%	6.9%
seldom	23.4%	14.4%	22.6%	21.9%
sometimes	37.0%	34.8%	35.5%	36.6%
frequently	21.8%	30.5%	23.7%	23.2%
almost always	10.3%	16.6%	14.0%	11.5%

Lawyers who had represented the plaintiff in their most recent case in arbitration were more likely to say they would recommend arbitration to clients if it became voluntary than were lawyers who had represented the defendant.<sup>140</sup> Similarly, lawyers who had a tort motor vehicle case most recently subject to arbitration were more likely to say they would recommend arbitration to clients than were lawyers who had been involved in a tort non-motor vehicle or contract case.<sup>141</sup>

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<sup>139</sup>  $F(2, 1269) = 10.20, p < .001$ . Lawyers in Maricopa County did not differ statistically significantly from those in counties other than Pima County.

<sup>140</sup>  $F(1, 756) = 12.02, p < .01$ .

<sup>141</sup>  $F(2, 785) = 8.11, p < .001$ .

A majority of lawyers thought that the court should make mandatory an ADR process other than arbitration, such as mediation or early neutral case evaluation, for cases under the current jurisdictional limit.<sup>142</sup> Pima County lawyers were less likely than lawyers in Maricopa County and the other counties to favor replacing arbitration with another mandatory ADR process.<sup>143</sup>

<b>Should Arbitration Be Replaced by Other Mandatory ADR?</b>	<b>Maricopa (n = 1913)</b>	<b>Pima (n = 254)</b>	<b>Other Counties (n = 154)</b>	<b>Statewide Total (n = 2399)</b>
No	38.6%	49.6%	40.3%	39.9%
Yes	61.4%	50.4%	59.7%	60.1%

Lawyers with cases subject to arbitration were less likely than lawyers with no cases subject to arbitration to think that arbitration should be replaced by another mandatory ADR process (57% vs. 63%).<sup>144</sup> And among lawyers with cases subject to arbitration, those who had most recently been involved in a tort case in arbitration were less likely than lawyers involved in a contract case to favor replacing arbitration with another mandatory ADR process.<sup>145</sup>

Lawyers had various suggestions about what other types of mandatory ADR processes the courts should (or should not) offer.<sup>146</sup>

In federal court, magistrates do free settlement conferences. Superior Court needs to do the same.

Pro bono settlement conferences using pro tem judges under Rule 16 should not be allowed

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<sup>142</sup> Under the present arbitration rules, the court may waive the arbitration requirement if the parties agree to participate in another court-approved ADR process. Ariz. R. Civ. Pro. 72(d)(2). Based on comments, some lawyers are not aware of this option.

<sup>143</sup>  $F(2, 2318) = 5.65, p < .01$ . Lawyers in Maricopa County did not differ statistically significantly from those in counties other than Pima County.

<sup>144</sup>  $F(1, 2258) = 9.67, p < .01$ . In Pima County, fewer than half of the lawyers (44%) thought that arbitration should be replaced by another mandatory ADR process.

<sup>145</sup>  $F(2, 775) = 12.79, p < .001$ .

<sup>146</sup> For additional comments about who the neutrals should be and how they should be paid, see *infra* Section IV.D.3.



as an alternative to mandatory arbitration. To avoid mandatory arbitration, the parties should have to hire a private neutral. Alternatively, pro tem judges should be allowed to charge the parties a reduced rate for their time (about \$150 per hour).

I would prefer to review civil filings and make recommendations.

I would prefer to see a new procedure that mandates mediation for these cases as opposed to arbitration. I would leave the hotly contested cases for the regular litigation process.

As to mandatory mediation, it's my experience that attorneys are relatively good about initiating settlement talks in cases that have a likelihood of settling. Thus, mandatory mediation is superfluous in the cases where settlement is likely, and a waste of time in all other instances.

The mandatory court-appointed arbitration system should be replaced by mandatory ADR at the expense of the litigants, through a similar rule as Rule 68, Offer of Judgment, or the rule about Requests for Admission.

I would be in favor of a binding arbitration system or a quicker neutral evaluation of the case.

Better to hire staff mediators to evaluate cases & have an hour session early in the case to set the stage for later settlement.

The parties should be able to opt out of arbitration in favor of other, more suitable ADR methods.

The court should make mandatory an alternative ADR process IN ADDITION to arbitration.

Early neutral evaluation would be a much better use of resources, and more attorneys would be willing to serve as neutral evaluators than as arbitrators.

For employment law cases, the mandatory arbitration process is in some respects repetitive of the Civil Rights Division process, in which a neutral party already reviews the materials and issues an opinion.

Forcing parties to settle (by making "good faith" ADR mandatory -- meaning the defendant MUST offer money, even on an entirely baseless claim) is additionally unconstitutional when the defendant has done nothing wrong.

Resources would be better spent in a mandatory mediation or other ADR procedure, where the lawyer's job is not to conduct a worthless "hearing" or "trial" but to tell the parties about the strengths and weaknesses of the case and try to foster a settlement.

We could tailor the jury trial for cases under \$50,000, such that the trial would be one-day or two-day trials, with ProTem Judges sitting on them. The Courthouse is virtually empty on Thursdays and Fridays, and we could easily schedule the under \$50K short-jury trials then. (Most of us would gladly volunteer to ProTem one-day jury trials.)

Either make it binding or substitute mediation or early neutral case evaluation.

We already have rule 16(g) mandating an evaluation of ADR alternatives between the parties. That should be enough.

The real answer is short trials. This finalizes cases in a short period of time. A judge could assist in obtaining high-low amounts.

Litigants should be given the option of mediation or binding arbitration.

I am a huge fan of ADR and would like to have more control, as an attorney representing my clients' best interests, in determining whether arbitration, or another form of ADR, would best serve the needs of my clients.

I would rather have a system of mandatory short trial with 4 in the box with a right to appeal, than this system.

A one-day summary jury trial is better because jurors tend to be much more common-sense and will understand and follow the law better than the average attorney/arbitrator.

Schedule a hearing with a judge to discuss high low agreements or binding awards to limit appeals. ADR should be used in conjunction with arbitration. Consider baseball arbitration. Each side picks a number and the arbitrator is required to award one of those two numbers. If these numbers are exchanged before the arbitration, more cases would settle. Allow the arbitrators to read position statements before the arbitration hearing and give a preliminary award. This too might influence more settlements.

If the objective is to encourage settlement then the arbitrator should be required to have considerable expertise in the area of litigation, the decision should be advisory and the process should not delay setting the matter for trial. If the objective is to reach a final and speedy resolution for small cases then such cases should be handled by professional judges under court rules which facilitate a quick resolution.

At the time of the survey, the jurisdictional limit was \$50,000 in Maricopa and Pima Counties and ranged from \$10,000 to \$50,000 in the other counties. A majority of lawyers felt their county's current jurisdictional limit should remain unchanged. Of those who thought it should be changed, more thought it should be raised than lowered. Although Maricopa County and Pima County had the same jurisdictional limit, lawyers in Maricopa County were less likely to think it should be raised than were lawyers in Pima County.<sup>147</sup> There were no statistically significant differences between lawyers who had cases subject to arbitration and those who did not in their views on the jurisdictional limit.<sup>148</sup>

<b>Should Jurisdictional Limit Be Changed?</b>	<b>Maricopa (n = 1815)</b>	<b>Pima (n = 252)</b>	<b>Other Counties (n = 145)</b>	<b>Statewide Total (n = 2282)</b>
lowered	17.1%	12.7%	13.1%	16.3%
remain unchanged	60.3%	57.1%	53.8%	59.6%
raised	22.6%	30.2%	33.1%	24.1%

Few lawyers commented on the jurisdictional limit. Among those who did, some were not correct about their county's current limit. One attorney suggested that the jurisdictional limit might affect the appeal rate:

I think the jurisdictional limit should be lowered because the current limit is high enough that many parties feel compelled to appeal an adverse ruling on a claim at the high end of the arbitration jurisdictional limit. A lower ceiling on cases referred to arbitration would result in arbitrated rulings limited to amounts that won't justify the extra cost of an appeal.

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<sup>147</sup>  $\chi^2(4) = 15.30, p < .01$ .

<sup>148</sup>  $\chi^2(2) = 5.17, p = .075$ .

A majority of lawyers felt the current time frame for the hearing (between 60 and 120 days after appointment of the arbitrator) was about right.<sup>149</sup> Of those who disagreed, most thought the time period was too short.

<b>Views on the Time Frame for the Hearing</b>	<b>Maricopa (n = 1938)</b>	<b>Pima (n = 262)</b>	<b>Other Counties (n = 155)</b>	<b>Statewide Total (n = 2429)</b>
too short	31.7%	27.1%	30.3%	30.6%
about right	63.7%	70.2%	64.5%	64.8%
too long	4.5%	2.7%	5.2%	4.6%

Lawyers with cases subject to arbitration were less likely to think the current time frame for the hearing was about right (60% vs. 71%) and were more likely to think it was too short (37% vs. 22%) than were lawyers with no cases subject to arbitration.<sup>150</sup> Lawyers who had represented the defendant in their most recent case in arbitration were more likely to say that the time frame was too short than were lawyers who had represented the plaintiff (53% vs. 37%).<sup>151</sup> And lawyers who had most recently been involved in arbitration in a tort motor vehicle case were more likely to say that the time frame for the hearing was too short (51%) than were lawyers who had been involved in a contract (39%) or tort non-motor vehicle case (45%).<sup>152</sup> Not surprisingly, lawyers who reported one or more continuances had been granted in their most recent case in arbitration were more likely to think the time frame for the hearing was too short than were lawyers whose case had not involved a continuance (53% vs. 38%).<sup>153</sup>

It is interesting that a majority of lawyers with cases subject to arbitration thought the time frame was about right, given that over two-thirds of counsel in arbitration requested one or more continuances,<sup>154</sup> and the actual amount of time before the hearing

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<sup>149</sup> There were no statistically significant differences among the counties ( $\chi^2(4) = 5.22, p = .27$ ).

<sup>150</sup>  $\chi^2(2) = 63.10, p < .001$ .

<sup>151</sup>  $\chi^2(2) = 19.24, p < .001$ .

<sup>152</sup>  $\chi^2(4) = 11.64, p < .05$ .

<sup>153</sup>  $\chi^2(2) = 34.73, p < .001$ .

<sup>154</sup> See *supra* Section IV.B.2.

took place was longer than the prescribed time frame in a majority of cases.<sup>155</sup> It also is interesting that there were no statistically significant differences in the responses of counsel in Maricopa and Pima Counties. Although they are subject to the same time frame once an arbitrator is appointed, counsel in Pima County have more time prior to the arbitrator appointment (which occurs after the motion to set is filed in Pima County, compared to after the answer is filed in Maricopa County) to conduct discovery than do counsel in Maricopa County.<sup>156</sup> Accordingly, one would have expected to find far more Maricopa County than Pima County lawyers saying the current time frame was too short.<sup>157</sup>

The following comments illustrate counsels' and arbitrators' views on the current time frame for the hearing.

I believe that it is almost impossible to arbitrate a case within 120 days. Often, an Independent Medical Examination is necessary, which takes time. I believe the Rule should state that the hearing shall be held within 180 days. I request an extension on almost every case, without exception. Having to do that is a waste of my time and my client's money.

The lead time before the arbitration hearing is often inadequate to properly prepare a defense of the case, especially if there are any problems with medical records or if discovery leads to additional information that is relevant to either liability or damages.

Waste of time and money to force parties to hearing when they haven't had time to prepare to give it their best shot; the inability to achieve that forces an appeal.

Some arbitrators refuse to set a date beyond the 120-day "deadline" and force an arbitration even before the medical records can be collected and discovery complete. Almost half the arbitrations I do are "blind" in the sense that I don't have all the records or haven't taken any depositions.

Discovery should be much more limited; Uniform and Non-Uniform Interrogatories, Requests for Admission and for Production, and 2 plus hour depositions are common.

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<sup>155</sup> See *supra* Sections III.A4.d, III.B.3.d.

<sup>156</sup> See *supra* Section II.B.

<sup>157</sup> When examining only those lawyers who had cases subject to arbitration, the comparison of lawyers' views in Maricopa and Pima Counties approached, but did not reach, statistical significance ( $\chi^2(4) = 8.18, p = .085$ ).

Before a case is sent to arbitration, the parties should have a rule 16 conference with the trial judge who is in a better position to set deadlines and control the process.

In my own experience as a litigant, arbitration cases take practically as much time to prepare for as court cases. Readiness for trial in 120 days is often unrealistic.

Generally, I believe insufficient time is permitted to conduct discovery, comply with Rule 26.1 and to adequately prepare for hearings. Most of my cases proceeding to arbitration are business dispute matters which require additional time. In most instances, the arbitrators will allow additional time; however, the rules move the parties to a hearing, in many instances, prematurely.

A recent contract case was compatible with that time but a pending legal malpractice case is not. A uniform time budget is not appropriate for cases that vary in complexity.

The parties rarely have completed discovery if the case requires depositions, for example, and require continuances in order to present their case. Running up against the inactive calendar deadlines is a real problem in most cases I've handled as an arbitrator.

On more than one occasion, I've received the notice of the appointment of the arbitrator and a requirement that the arbitrator set the arbitration date BEFORE THE RULE 26.1 DISCLOSURE STATEMENTS ARE DUE! The current time line of demanding the Arbitration take place so soon penalizes the defense, and makes the process inherently unfair. As a defense attorney, I do not schedule the Plaintiff's deposition until I have received their Disclosure Statement and signed medical authorizations. On more than one occasion, I barely had deposed the plaintiff when the Arbitrator "had to comply with the Court" to schedule the arbitration. The defense was precluded from presenting any expert defense, because the defense had not "disclosed" the expert and his/her opinions 30 days prior to the Arbitration. (Of course, the defense cannot disclose the defense expert's opinions when the deposition transcript of the Plaintiff is still being typed by the court reporter.) At times, the Arbitrator refused to grant the continuance because of the "requirement" that the Arbitration be held by a certain date. In those cases, I had to go to the judge, spending attorneys' fees, to get a continuance.

A \$50,000 case is not necessarily faster to prepare or less complicated than a \$500,000 case.

Most lawyers thought parties sometimes or often appealed arbitration decisions for the primary purpose of securing an advantage in settlement negotiations. Lawyers in Maricopa County were more likely than those in Pima County and the other counties to say that parties often appealed to gain a settlement advantage.<sup>158</sup>

<b>How Often Do Parties Appeal for Settlement Advantage?</b>	<b>Maricopa (n = 1779)</b>	<b>Pima (n = 245)</b>	<b>Other Counties (n = 128)</b>	<b>Statewide Total (n = 2215)</b>
never	.6%	.4%	3.1%	.7%
seldom	12.1%	15.5%	18.8%	12.9%
sometimes	42.2%	56.7%	46.1%	43.8%
often	45.1%	27.3%	32.0%	42.6%

There were no statistically significant differences between lawyers who had cases subject to arbitration and those who did not in their views of parties' reasons for appeal.<sup>159</sup> However, lawyers who had recently represented a plaintiff in arbitration were more likely than lawyers who had recently represented a defendant to say that parties often appealed to secure an advantage in negotiations (48% vs. 36%).<sup>160</sup>

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<sup>158</sup>  $\chi^2(6) = 47.08, p < .001$ .

<sup>159</sup>  $\chi^2(3) = 6.60, p = .086$ .

<sup>160</sup>  $F(1, 781) = 12.39, p < .001$ .

Almost half of the lawyers thought the disincentive to appeal arbitration decisions should remain unchanged (*i.e.*, that the appealing party must obtain a judgment that improves by 25% its outcome as a result of the arbitrators' award or must pay the other party's costs and fees associated with the appeal).<sup>161</sup> Just over half of the lawyers thought the disincentive for appeal should be changed, but they disagreed about how it should be changed.<sup>162</sup> Of those lawyers who favored change, more favored increasing (to 33%, 35%, 50%) rather than decreasing or abolishing percentage by which an appealing party must improve its outcome compared to the award.

Should Appeal Disincentive Be Changed?	Maricopa ( <i>n</i> = 1811)	Pima ( <i>n</i> = 253)	Other Counties ( <i>n</i> = 147)	Statewide Total ( <i>n</i> = 2278)
abolish disincentive	11.7%	7.5%	14.3%	11.3%
lower percentage	13.1%	13.8%	9.5%	12.8%
remain unchanged	46.5%	47.0%	48.3%	47.0%
increase percentage	28.7%	31.6%	27.9%	28.8%

Lawyers with cases subject to arbitration were less likely to think the disincentive should remain unchanged (44% vs. 51%) and were more likely to think it should be increased (31% vs. 27%) than were lawyers with no cases subject to arbitration.<sup>163</sup> Among lawyers who represented clients in arbitration, those who had represented the plaintiff in their most recent case were more likely than those who had represented the defendant to say that the disincentive should be increased (38% vs. 20%) and were less likely to say that it should remain unchanged (37% vs. 46%) or be abolished (11% vs. 17%).<sup>164</sup> Lawyers who had most recently been involved in arbitration in a tort motor vehicle case were more likely to favor increasing the disincentive (35%) than were lawyers involved in a contract (29%) or tort non-motor vehicle case (24%).<sup>165</sup> Not surprisingly, lawyers who appealed the arbitrator's award in their most recent case were more likely to favor abolishing the disincentive (30% vs. 7%) and were less likely to

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<sup>161</sup> Ariz. R. Civ. P. 76(f).

<sup>162</sup> There were no statistically significant differences among the counties ( $\chi^2(6) = 6.89, p = .33$ ).

<sup>163</sup>  $\chi^2(3) = 10.68, p < .05$ .

<sup>164</sup>  $\chi^2(3) = 32.43, p < .001$ .

<sup>165</sup>  $\chi^2(6) = 15.36, p < .01$ .



favor increasing the disincentive (17% vs. 29%) than were lawyers in cases in which the other side appealed the award.<sup>166</sup>

Lawyers commented not only on the percentage of improvement that the appeal disincentive should involve, but also on other changes, including changing the standard of review or eliminating the opportunity to appeal altogether.

I would like to see the required improvement changed to 50% because there are too many appeals.

To be fair, the SAME evidence presented at the arbitration must be the SAME evidence presented at trial. In these cases, the defense plans for an appeal from the outset and intentionally puts on a weak case by failing to submit any evidence (such as IME or expert testimony), usually relying upon simple "cross-examination" of Plaintiff as a complete defense. This typically results in an award that is easier to "beat" on appeal.

In lemon law/breach of warranty cases. . . it is their [manufacturers'] standard practice to . . . automatically appeal when they loose. This practice is rewarded by the fact that the Arbitration fee-shifting penalty is meaningless where the statutes involved call for the manufacturers to pay the consumer's attorney fees anyway. It should also be noted that the arbitration fee-shifting penalty also crates a conflict of laws with the statute's fees-to-the-prevailing-consumer language; this issue has not arisen yet.

I would recommend that there be two layers of arbitration. One for cases less than \$15,000 [another attorney said for \$25,000], from which there would be no appeal. The other would be the same as existing law.

I think that the arbitration process is of little or no benefit unless parties are bound by the decision. The "disincentive to appeal" is regularly abused, particularly by P.I. defendants who put on no defense so that a large plaintiffs award is rendered, which can be easily be bettered on appeal (by actually putting on a defense).

Even if constitutional change is required, abolish de novo review on appeal.

To be effective, arbitration should be binding, but voluntary.

The loser should have to post a 25% bond to appeal, rather than just litigating for free until he is bankrupt (as my most recent opponent appealing the arbitration admits to doing).

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<sup>166</sup>  $\chi^2(6) = 46.64, p < .001$ .

One additional disincentive that should be considered is to prohibit parties from adding expert witnesses and other evidence between the arbitration and the trial de novo; for example, if the expert's affidavit was not presented to the arbitrator, the expert should not be permitted to testify at trial.

Appeals should be subject to similar standards of review given to administrative hearings (i.e., arbitrator's award will be upheld unless no substantial evidence exists to support finding).

The possibility of sanctions of costs and fees on appeal is prohibitive to an individual plaintiff. The same cannot be said about the insurance company.

The entire system as presently designed and implemented is an unfair (and probably unconstitutional) burden on the citizen's right to a civil jury trial.

The disincentives themselves are unfair to litigants with small claims who genuinely believe the arbitrator's decision was erroneous.

The disincentive to appeal is a very bad idea unless or until arbitration results are more generally fair.

I don't think the parties to these cases should be punished for unsuccessful appeals, because I think it is unfair to burden the parties to smaller cases with costs or penalties for insisting on a decision by a real judge, when the parties to larger cases get to be heard by a real judge as a matter of course.

If the program is to be meaningful, it should either function like contractual arbitration, i.e., with very limited review, or it should be reviewed by the Superior Court on the record before the arbitrator and subject to the same standards of review as an appeal from the Superior Court so that the parties have to take their best shot in the arbitration.

Change the standard of review from de novo to abuse of discretion or clearly erroneous for arbitration appeals. Have an expedited and condensed appellate process (e.g., one 5 page brief by each side, then oral argument) by judges assigned to the case.

Raising the disincentive % is not a fair solution because Arb results in small PI auto accident cases are typically appreciably higher than jury awards. Look at the Trial Reporter.

Make arbitrations binding, or reviewable on the record rather than de novo.

One of the main problems I have experienced with arbitration is there is no incentive for a party to participate in disclosure or discovery prior to arbitration, as once an appeal is made to the trial court the Court hears the case de novo.

### **3. Views of Arbitrator Service and Compensation**

A majority of lawyers felt that arbitrator service should be voluntary. Lawyers in Pima County (59%) were less likely than lawyers in Maricopa County (67%), who in turn were less likely than lawyers in the other counties (77%), to think that arbitrator service should be voluntary.<sup>167</sup>

<b>Should Arbitrator Service Be Mandatory or Voluntary?</b>	<b>Maricopa (n = 2003)</b>	<b>Pima (n = 268)</b>	<b>Other Counties (n = 159)</b>	<b>Statewide Total (n = 2509)</b>
mandatory	33.4%	40.7%	23.3%	33.0%
voluntary	66.6%	59.3%	76.7%	67.0%

Lawyers who had cases subject to arbitration were less likely to think that arbitrator service should be voluntary than were lawyers with no cases subject to arbitration (62% vs. 73%).<sup>168</sup> Among lawyers who represent clients in arbitration, those who thought the arbitrator in their most recent case had not been at all prepared were more likely to favor voluntary service than if the arbitrator had been very prepared (78% vs. 53%).<sup>169</sup>

Many lawyers provided their views about mandatory arbitrator service, particularly given the rate of compensation, as well as suggesting alternatives for how the courts should handle these cases.<sup>170</sup> Following are some examples.

I do not object to acting as an arbitrator at all. In fact, I rather enjoy it. However, being required to "donate" over a \$1000 worth of time to a county to which I already pay taxes and that is required by law to provide the services I am donating, is involuntary servitude.

I do not believe that mandatory participation as an arbitrator is a good basis for a successful program. There should instead be a voluntary participation program with a core of paid arbitrators that serve under the guidance of the superior courts.

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<sup>167</sup>  $F(2, 2430) = 6.87, p < .01$ .

<sup>168</sup>  $\chi^2(1) = 29.28, p < .001$ .

<sup>169</sup>  $\chi^2(2) = 12.76, p < .01$ .

<sup>170</sup> For related comments, see *infra* at the discussion of how arbitrators should be compensated.

Mandatory arbitration takes responsibility away from the judiciary and places the responsibility on the backs of lawyers, who often do not have the training or experience necessary to perform the task. Why aren't arbitrations performed by judges or commissioners, who are supposed to be doing the job of deciding controversies?

These mandatory arbitrations are outrageous. I would like to send the judges some of my extra work for them to do. Why can't they do their own work, or these civil attorneys pay?

I resent very much being involuntarily appointed as an arbitrator and, as a sole practitioner, find it to be an extremely unreasonable burden on me and my law practice. It is, in my opinion, an unjust shifting of the court's responsibility and should be terminated immediately.

If I don't want to be an arbitrator, no entity should have the power to force me.

If more judges are needed, hire more judges.

If the arbitrators service was voluntary v. mandatory, it would place too much of a burden on the few volunteers.

Mandatory arbitration is a device whereby the courts offload their constitutional and statutory responsibility to decide cases on members of the bar, to their economic detriment, in violation of the governing arbitration statute. There is no logical reason why this burden should be shouldered by the bar instead of by the county and the courts. Citizens are entitled to have their cases decided by judges unless they elect an alternative.

If someone takes their cases to arbitration they should volunteer their time to serve as an arbitrator on other cases. We are supporting attorneys who never support our work product while they are getting paid for doing their work. If we are mandating public service, my time is much better suited doing other pro bono or charitable work.

Drafting random lawyers to do the Court's job is inefficient, unduly burdensome and does not deliver the type of justice I think we should be interested in.

I like serving in this capacity, but I resent being conscripted to do so.

I do only indigent representation and do not have clients who benefit from arbitration. I highly resent compulsory service as an arbitrator.

It is patently unfair to require someone to arbitrate who contributes numerous pro bono hours to the bar in other contexts.

If Arbitrators are desired, they should be hired.

The state of Arizona has a constitutional obligation to hire sufficient judges and/or professional arbitrators to handle cases filed with the court system and it is wrong to force service on a small portion of the population rather than taxing all of the public to pay for necessary services.

The current Arbitration System is a tax on licensed attorneys.

I think voluntary service is possible, but then the courts would have to screen the volunteers to avoid a situation where people become arbitrators because they aren't competent to do anything else (resulting in aggravation for parties and bad results) or because they have an agenda they want to pursue. This would add another layer of administration to the whole process.

It is amazing to me that Arizona courts not only permit but benefit from the involuntary servitude they have imposed on members of the State Bar of Arizona. It is not my job to reduce the costs of the courts by spending my un-compensated time resolving cases filed for court action. Please eliminate this unauthorized tax on my earning power and the threat it presents to my license to practice law.

I actually enjoy serving as an arbitrator and consider it to be community and professional service.

Think about using pro tem judges as the arbitrators, paying them \$150 per hour and make it a taxable cost that can be waived for indigent parties.

It is the duty of the legislature to provide adequate support for the judicial system. The existence of a workable system should not depend on the forced labor of attorneys.

I would favor having a class of professional arbitrators perhaps as an adjunct to mediation practices who are paid a decent wage from the Court.

The mediator and arbitrator should be paid for his/her services just like judges and court personnel are paid for their services.

There should be a branch within the court system for full time paid employees who know what they are doing to resolve small disputes.

Has anyone looked at the feasibility of hiring a few attorneys through the State Bar, or the courts, to handle these cases on a full-time basis?

I believe the court system should hire or contract with permanent full-time arbitrators to hear cases below the compulsory limit.

The counties should budget more money for commissioners to hear the cases.  
The county should move toward a trained and recruited professional ADR staff, whether employees or contractors.

If the public is going to pay for this service to litigants, it should be done through the creation of a corps of publicly paid arbitrators. They would gain experience in this line of work and would do a much better and more efficient job.

It would be worth while in judicial time saved to have compensated experienced arbitrators.

Make it a real program with staff or drop the whole idea. Taxing my resources on top of my own chosen pro bono work is a serious strain on a solo practice when none of the participants wants to work within the system.

The State's justice system would be better served by increasing the number of full-time Superior Court judges to a reasonable number, and having ADR conducted by personnel employed full-time by the Superior Court.

I really resent being asked to do a judge's work and shouldering the burden of the taxpayers in "donating" my services in this area. I think the county boards should provide more judges and more judges should be devoted to resolving the backlog in civil cases. I am very tired of being called on to help out the court's when craven politicians will not appropriate sufficient funds to have an adequate justice system, all in an effort to advance their pathetic political careers.

It is unjust that attorneys are required to subsidize the civil court system with mandatory arbitration duties. There is no mandated pro bono assistance on immigration cases or domestic relations cases or criminal cases. Why civil cases?

I don't understand why private lawyers are drafted to give free work to help the plaintiff's bar or the insurance defense bar and that's what [motor vehicle torts] most of these cases are about.

When asked how likely they would be to serve as an arbitrator at the current rate of \$75 per hearing day if arbitration service were voluntary, relatively few lawyers said they would be very likely to serve. Pima County lawyers were more likely (53%) than lawyers in Maricopa County and the other counties (43% each) to say they would serve voluntarily.<sup>171</sup> A larger proportion of lawyers who had cases subject to arbitration said they would be very or somewhat likely to voluntarily serve as arbitrators than did lawyers who did not have cases subject to arbitration (51% vs. 36%).<sup>172</sup>

<b>If Voluntary, Would You Serve at Current Pay Rate?</b>	<b>Maricopa (n = 2004)</b>	<b>Pima (n = 268)</b>	<b>Other Counties (n = 158)</b>	<b>Statewide Total (n = 2510)</b>
very unlikely	35.8%	25.0%	37.3%	35.2%
unlikely	20.8%	19.8%	19.6%	20.6%
somewhat likely	26.4%	28.7%	28.5%	26.6%
very likely	17.0%	26.5%	14.6%	17.6%

Lawyers' comments revealed the benefits they get from serving as an arbitrator and that some have tried unsuccessfully to volunteer their services. Several lawyers suggested that they would be more willing to serve as arbitrators if they were assigned to cases in their area of expertise.

The only way I would participate as a voluntary arbitrator or mediator would be if I was only hearing or working on cases in my practice area.

If it were a case in which I had expertise, I would be far more likely to do it, especially if I could get credit or designation as a JPT.

If you permitted me to identify areas of legal expertise and to serve only in those areas, I would be very likely to volunteer.

I view my service as an arbitrator as an opportunity to provide a public service. I generally enjoy the experience.

How is it that I have NEVER been called upon to serve as an arbitrator? I have even gone to calendar services and given my name. I have an extremely large, successful and active personal

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<sup>171</sup>  $F(2, 2427) = 10.16, p < .001$ .

<sup>172</sup>  $F(1, 2361) = 53.82, p < .001$ .

injury practice, but have NEVER been assigned a case.

I think the system works well, and we as lawyers should be more than willing to serve.

I look forward to taking my time to participate, from the standpoint of learning new law and having new experiences outside my normal practice area.

Although I have tried a couple of times, I have been unable to get my name added to the list of potential arbitrators and have been told that Pima County is unable to add new names due to the age of the program used.

I find it enlightening to sit on these cases as a reminder of what the view from the bench looks like.

Serving as an arbitrator has been a valuable experience. I consider it a service to the bar and the justice system.

I learn a lot about the issues, the law, and good advocacy.



How does the percentage of lawyers who say they would be “very likely” to voluntarily serve as an arbitrator translate into the number of lawyers who would be available to serve? To get a rough idea, we began with the number of active State Bar members (8,694 in Maricopa County and 1,923 in Pima County). From that we subtracted 40%, a figure chosen to approximate the proportion of lawyers who are ineligible or exempt from serving as an arbitrator.<sup>173</sup> This resulted in the estimated pool of potential arbitrators numbering 5,216 lawyers in Maricopa County and 1,154 in Pima County.

We then multiplied each of these numbers by the percentage of lawyers who said they would be “very likely” to serve voluntarily as an arbitrator from the table above.<sup>174</sup> This resulted in an estimated 887 lawyers in Maricopa County and 306 lawyers in Pima County who would be very likely to serve voluntarily. Each of these potential volunteer arbitrators would have to be assigned five to six cases per year in Maricopa County and three cases per year in Pima County to meet the current volume of cases assigned to arbitration. In terms of cases in which an award was filed, however, each arbitrator would have to conduct a hearing in two to three cases per year in Maricopa County and one to two cases per year in Pima County.<sup>175</sup>

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<sup>173</sup> We selected 40% because that is the percentage of survey respondents who said they did not have direct experience with court-annexed arbitration in Arizona. *See supra* Section IV.A. This figure may over-estimate the percentage of lawyers who are ineligible to serve as arbitrators, as there are other reasons for lawyers to not have experience with arbitration. Accordingly, these calculations are likely to produce a conservative estimate of the pool of available arbitrators.

<sup>174</sup> This question, however, assessed lawyers’ willingness to serve voluntarily at the current rate of pay (and presumably under the program as otherwise currently structured). Based on lawyers’ comments, it is likely that the percentage of lawyers willing to volunteer would be greater if the type or amount of compensation were changed and, in Maricopa County, if arbitrators were assigned to cases in their substantive area.

<sup>175</sup> In Maricopa County, 4,929 cases were assigned to arbitration and 2,118 had an award filed in 2003. In Pima County, 908 cases were assigned to arbitration and 380 had an award filed. *See supra* Section III.C.2.

A majority of lawyers felt that arbitrators should be assigned only to cases in which they have subject matter expertise. Lawyers in Maricopa County (70%) were less likely to favor assigning arbitrators based on subject matter than were lawyers in Pima County and the other counties (78% and 83%, respectively).<sup>176</sup>

<b>Should Arbitrators Be Assigned Based on Subject Matter?</b>	<b>Maricopa (n = 1992)</b>	<b>Pima (n = 268)</b>	<b>Other Counties (n = 157)</b>	<b>Statewide Total (n = 2494)</b>
No	30.4%	17.2%	22.3%	28.6%
Yes	69.6%	82.8%	77.7%	71.4%

There were no differences between lawyers who had cases subject to arbitration and those who did not in whether they thought arbitrators should be assigned based on subject matter expertise.<sup>177</sup> Among lawyers who represented clients in arbitration, however, those who thought the arbitrator in their most recent case in arbitration did not understand the issues were more likely to favor arbitrator assignment based on subject matter than were those who thought the arbitrator had a very good understanding of the issues (93% vs. 70%).<sup>178</sup> Among lawyers who served as arbitrators, those who were not at all familiar with the area of law in the case they most recently arbitrated were more likely to favor arbitrator assignment based on subject matter than were those who were very familiar with the area of law (81% vs. 75%).<sup>179</sup> Similarly, arbitrators who felt they did not have sufficient information on the facts and the law to decide the cases were more likely to favor subject matter matching than were arbitrators who felt they had enough information (86% vs. 67%).<sup>180</sup>

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<sup>176</sup>  $F(2, 2415) = 11.83, p < .001$ . Lawyers in Pima County did not differ statistically significantly from those in counties other than Maricopa County.

<sup>177</sup>  $\chi^2(1) = .536, p = .464$ . This was one of the few assessments for which analyses of the lawyers' general area of practice showed a different pattern than did whether they had an arbitration caseload. Lawyers who had primarily a transactional/criminal were more likely to favor subject matter matching (76%) than were lawyers who had primarily a civil litigation or a "mixed" practice (70% and 68%, respectively) ( $\chi^2(2) = 10.11, p < .01$ ).

<sup>178</sup>  $\chi^2(2) = 11.98, p < .001$ .

<sup>179</sup>  $\chi^2(2) = 33.33, p < .001$ .

<sup>180</sup>  $\chi^2(3) = 39.61, p < .001$ .

Following are illustrative reasons why lawyers felt arbitrators should (or should not) be assigned to cases in their specific substantive area and why only civil litigators should serve as arbitrators.

When the arbitrator has little or no experience in this area of law it can require additional time to educate the arbitrator.

Because this area of law [lemon law/breach of warranty] is not practiced by the vast majority of Arbitrators (none so far), manufacturers slam them with every BS argument they can think of, causing the Arbitrations to take much longer and be much more complex than necessary (the spaghetti technique, throw it all up and see what sticks). The vast majority of the arguments they raise have been resolved, but the Arbitrators usually don't know it.

Arbitrators hearing cases within their field of expertise are more biased than those unfamiliar with the subject matter of the case. Jurors generally have no expertise and are therefore less biased.

Unless the arbitrator is viewed as having expertise or at least basic knowledge of the type of case in dispute, he/she will have no credibility with the parties.

Attorneys without experience in that area cannot help with settlement because they do not have the background needed.

If I attempted to accept a tort motor vehicle case for a client, the Bar would probably cite me for practicing without adequate expertise. Yet I am deemed qualified to sit in judgment on such matter because it is convenient for the court? It's absolutely hypocritical.

It is unfair to myself, the litigants and the other attorneys to force someone with no litigation experience to handle complex motions and complicated legal proceedings.

Transaction lawyers should do contract cases only.

I think it is ridiculous that I was called to serve as an arbitrator. I have never been involved in any aspect of litigating a case -- I have never filed a lawsuit, attended a deposition, or for that matter even been in a courtroom. In my opinion, if the state bar is going to continue to require mandatory arbitration, it should limit the pool of arbitrators to attorneys who actually participate in the litigation process.

I do not think you can have the public feel like they have their day in court when cases are assigned to arbitrators who are unfamiliar with the law.

I am a patent attorney who, for my entire career, has done exclusively intellectual property

transaction work. This means: no litigation, no Arizona case law, no civil procedure (Arizona or federal), no knowledge of standards of what the parties' lawyers should provide, reasonable damages, reasonable rulings, etc. Giant waste of time for us all.

I believe that only the litigation attorneys should serve as arbitrators as they are experienced with the rules of civil procedure, etc.

I have absolutely no expertise in either litigation procedures or torts. . . . Does anyone else believe this might impact the quality of the decision? Or is the insurance lobby such that no one cares?

The majority of lawyers felt that arbitrators should receive training in arbitration procedures prior to serving as an arbitrator. Lawyers in Maricopa and Pima Counties were less likely to favor arbitrator training than were lawyers in the other counties.<sup>181</sup>

Should Arbitrators Receive Training Before Serving?	Maricopa (n = 1979)	Pima (n = 268)	Other Counties (n = 153)	Statewide Total (n = 2477)
No	46.6%	47.8%	28.1%	45.1%
Yes	53.4%	52.2%	71.9%	54.9%

Lawyers with cases subject to arbitration were less likely to think arbitrators should receive training in arbitration procedures than were lawyers with no cases subject to arbitration (49% vs. 62%).<sup>182</sup> This seems to reflect the desire of lawyers who are familiar with arbitration procedures to not have to go through arbitration training or, conversely, the desire of those who are not familiar to receive training. Among the lawyers who served as arbitrator, those who were not at all familiar with arbitration procedures were more in favor of arbitration training than those who felt they had sufficient knowledge about arbitration procedures (89% vs. 42%).<sup>183</sup> And among lawyers who represented clients in arbitration, those who felt the arbitrator in their most recent case in arbitration was not at all familiar with arbitration procedures were more likely to favor arbitration training than were lawyers who felt the arbitrator was very knowledgeable (54% vs. 41%).<sup>184</sup>

Following are a few of the lawyers' comments about arbitration training.

Potential arbitrators should be required to demonstrate competency in both the arbitration process and in those areas where they agree to accept arbitration assignments. This competency should be re-confirmed periodically. This would assure more competent arbitrators.

You need to offer free training to arbitrators. Until recently I worked as a transactional lawyer

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<sup>181</sup>  $F(2, 2398) = 10.18, p < .001$ .

<sup>182</sup>  $\chi^2(1) = 34.36, p < .001$ .

<sup>183</sup>  $\chi^2(2) = 121.56, p < .001$ .

<sup>184</sup>  $\chi^2(2) = 9.14, p < .05$ .

for a corporation. I have dealt with little litigation in the past 20 years.

Some form of arbitration training (preferably on-line) MUST be available for those attorneys who do not engage in litigation. I could find absolutely no resources for conducting arbitrations. I am not a litigator and have no experience in this area.

A bright lay person who was given some real instruction focused on small motor vehicle tort claims and how to figure who is most likely fabricating testimony could do this job.

I feel arbitration should be done by TRAINED, PROFESSIONAL arbitrators--both in law and in mediation skills.

I think attorneys experienced in litigation should not receive any training. It does not make sense for transactional attorneys, trusts and estates attys, tax attys etc.. to serve as arbitrators at all. If they serve, they should be trained.

Special education is not needed, just ease in looking at the law. Perhaps a pamphlet or a booklet free to the arbitrators and automatic updates – as a judge pro tem would be granted.

What is abundantly clear is that on a grand scale we have in Maricopa County 1000's of arbitrators, without formal training, without guidance, without uniform standards, without reference materials, each with his or her own idea as to what "rough justice" might be, running amok, ad hoc – at the vanguard, it would seem, of the limited jurisdiction court system that substantially shapes public trust and confidence in our judicial system.

Quality at this level will pay dual dividends. The public's need for consistency and perception of quality will be met and will promote economy through lack of appeals.

When asked which one method of arbitrator compensation they would most like to see their county adopt, the lawyers tended to choose either a reasonable hourly rate for all time spent on the case or no pay but non-monetary benefits, such as CLE credit or designation as a judge *pro tem*. Lawyers in Maricopa County were more likely to favor no pay but non-monetary benefits and less likely to favor a reasonable hourly rate than were lawyers in Pima County and the other counties.<sup>185</sup> Lawyers with cases subject to arbitration did not differ from those with no cases subject to arbitration in how they thought arbitrators should be compensated.<sup>186</sup>

How Should Arbitrators Be Compensated?	Maricopa (n = 1954)	Pima (n = 263)	Other Counties (n = 154)	Statewide Total (n = 2447)
no pay	5.5%	1.1%	3.9%	4.7%
no pay, but non-monetary benefits	42.2%	26.2%	25.3%	38.9%
\$75 per hearing day	5.8%	11.8%	4.5%	6.5%
nominal hourly pay for all time	8.2%	12.9%	16.9%	9.4%
reasonable hourly rate for all time	34.2%	43.7%	46.1%	36.3%
other	4.0%	4.2%	3.2%	4.0%

Among the lawyers who selected “other,” many proposed a higher daily rate or flat fee (*e.g.*, \$150, \$200, \$250, \$300, \$500, or \$800). Some lawyers proposed a combination of several of the options (*e.g.*, \$75 per day plus CLE credit plus judge *pro tem* designation). Following are explanations some lawyers provided for their above answers, as well as selected additional suggestions.

I think the payment should be automatically sent to us in the form of a check at the time of appointment.

The very minimum amount should be equal to the rate set by the court for indigent appointments.

The arbitrator should get some compensation for time spent considering dispositive motions.

Another alternative to arbitrator compensation could involve pro bono credits.

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<sup>185</sup>  $\chi^2(10) = 72.32, p < .001$ .

<sup>186</sup>  $\chi^2(5) = 5.36, p = .374$ .

Arbitrators should be compensated for all of their work, not just for the arbitration hearing. As an arbitrator, I usually spend more time on pre-hearing and post-hearing matters (i.e., pre-hearing motions, reviewing documents, legal research, writing a decision), than on the hearing itself.

Avoid paying an hourly fee because that will generate disputes about whether the arbitrator actually worked that hard, and resolving those disputes will in turn require time and energy. Instead, the flat rate should be increased to something like \$200 per hearing day (and then review the rate regularly).

The "benefit" of designating arbitrators as a 'judge pro tem' will introduce a whole new can of worms and cheapen the designation of a true judge pro tempore.

CLE credit is a great idea. Make it ethics credit and we'll all show up.

CLE would be the best. You certainly do learn as an arbitrator. It should limit the credit to 5 hours.

Being a lawyer is a privilege, occasional service to the court is a small return to the system and community.

If you put an hourly rate, people will just abuse the system and write down unreasonable hours.

I see it as part of the quid pro quo for being able to practice law, we should use our expertise (especially in our primary areas of practice) to alleviate some of the burden on the courts.

We should be allowed to treat arbitrator service as pro bono time.

I enjoy acting as an arbitrator. It would be better if I could justify the time I spend on these cases in terms of overhead and staff time. If I could, I wouldn't mind doing more, and having the arbitration experience count toward serving as a judge pro tem or help in applying for a judgeship or position as a commissioner.

Arbitrators are as important as the Superior Court Judges and need to be paid accordingly, not treated as second class citizens or lackeys of the judges. All too often our Court system uses pro bono as the alternative to balancing their budgets.



When asked how their county should obtain money for arbitrators' fees, the majority thought it should come from sources other than the court's budget. Over half of the lawyers favored having either both parties or the losing party pay the arbitrator's fees. The least favored option was a surcharge on all civil cases. Lawyers in Maricopa County were less likely to favor obtaining fees from the court's budget, and were more likely to favor assessing the fees as a taxable cost against the losing party, than were lawyers in Pima County and the other counties.<sup>187</sup> Among the lawyers who chose "other," many said there should be no arbitrator fees because arbitrators should serve pro bono, especially because the use of arbitration is mandatory.

<b>How Should County Obtain Money for Arbitrators' Fees?</b>	<b>Maricopa (n = 1884)</b>	<b>Pima (n = 252)</b>	<b>Other Counties (n = 153)</b>	<b>Statewide Total (n = 2365)</b>
from the court's budget	21.6%	29.4%	28.8%	22.8%
split equally between parties	31.3%	29.4%	35.3%	31.4%
assessed as a taxable cost against losing party	29.5%	23.4%	19.0%	28.2%
through surcharge on all civil cases	13.6%	14.3%	14.4%	13.8%
other	4.0%	3.6%	2.6%	3.9%

Lawyers who had cases subject to arbitration were more likely to think that money for arbitrators' fees should come from the court's budget (25% vs. 20%) and were less likely to think that fees should be split equally between the parties (29% vs. 34%) than were lawyers who had no cases subject to arbitration.<sup>188</sup>

The following comments illustrate lawyers' views on this topic.

This is a program whose very existence supports the state legislature's unwillingness to adequately fund the state's judiciary.

The state's superior courts should be appropriated sufficient funds to hire arbitrator employees and more judges and commissioners. Stop expecting us to work for free to support an irresponsible legislature!

I think the parties would be better prepared and more like to take the process seriously if they were required to pay for arbitration services, instead of receiving those services for free.

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<sup>187</sup>  $\chi^2(8) = 18.04, p < .05$ .

<sup>188</sup>  $\chi^2(4) = 17.21, p < .01$ .

If the parties pay the arbitrator the arbitrator will 'play' their decisions to the parties.

The reality is that the costs of these cases arise out of our transportation system. Fund the system with a gas tax, a tax on insurance companies or a percentage of the amount awarded under the system.

The present use of court compelled arbitrators . . . forces all lawyers to subsidize the practices and the clients of counties' litigators. People who are so unreasonable that they can't compromise and settle their own disputes should be made to bear the whole cost of third-party resolution rather than being given the gift of free arbitration at the expense of the lawyers of a given jurisdiction.

The irony of suggesting that litigants pay for the arbitrator's services is that people with smaller claims are given less access to the courts than those with bigger claims.

Since the majority of the arbitration cases involve tort matters, why not assess the portion of the bar that avails itself of the system a surcharge in order to pay the County expense of hiring professional arbitrators; perhaps the current disregard of the arbitration decision by the attorneys involved would cease if they are required to pay extra for the arbitration process.

Costs of arbitration should be borne by the litigants and not the arbitrator. I am a sole practitioner and postage and copy costs add up.

The expense of deciding cases is a public responsibility, and should be borne by the taxpayer and not by non-volunteer members of the legal profession.

I believe the judicial system ought to obtain appropriate funding from various sources, such as the legislature and users of the services, in order to provide adequate services by court personnel.

Civil litigants should have to pick up their own costs and pay for mandatory arbitration.

This is a cost that is the responsibility of the county and ultimately the taxpayer.

You shift the economic burden from the court to attorneys who are struggling to make a living (at least the judges earn a salary). If this helps the court so much, let the court budget pay for it.

The cost of litigation should be borne by the losing party, not by the arbitrator, who has been forced to "serve" under penalty of losing his or her license.

#### **4. Views of Arbitration's Effectiveness**

The lawyers were asked how effective the arbitration program in their county was in achieving six goals commonly ascribed to court-connected arbitration programs. Although for most of the goals the proportion of lawyers who thought arbitration was effective was slightly larger than the proportion who thought it was ineffective, a fairly sizeable proportion gave a neutral response.<sup>189</sup> Generally fewer than half of the lawyers thought arbitration was effective in achieving these goals. Lawyers in Pima County rated arbitration as more effective in accomplishing five of the six goals than did lawyers in other counties.

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<sup>189</sup> A number of the lawyers commented that they did not have sufficient information to answer these questions. This may explain why fewer lawyers answered some of these questions than other questions in the survey, as well as why a sizeable number of lawyers gave the neutral response of “3” on a five-point scale ranging from extremely ineffective to extremely effective.

Across the counties, 34% to 50% of the lawyers thought arbitration was effective in resolving disputes more quickly than traditional litigation, whereas 21% to 33% thought it was ineffective in achieving a faster resolution. Lawyers in Pima County thought arbitration was more effective in resolving cases faster than did lawyers in Maricopa County and the other counties.<sup>190</sup> Lawyers with cases subject to arbitration thought arbitration was more effective in resolving cases faster than did lawyers with no cases subject arbitration.<sup>191</sup> This was the only goal on which these two groups differed. Among lawyers who represented clients in arbitration, those who had most recently been involved in a tort motor vehicle cases thought arbitration was more effective in resolving cases faster than did those who had been involved in a contract case.<sup>192</sup>

<b>Effective in Resolving Cases Faster</b>	<b>Maricopa (n = 1971)</b>	<b>Pima (n = 262)</b>	<b>Other Counties (n = 151)</b>	<b>Statewide Total (n = 2466)</b>
1, Extremely ineffective	11.3%	5.7%	11.9%	10.9%
2	21.6%	14.9%	19.9%	20.6%
3	33.1%	29.8%	27.8%	32.4%
4	25.5%	32.4%	32.5%	26.7%
5, Extremely effective	8.5%	17.2%	7.9%	9.3%

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<sup>190</sup>  $F(2, 2382) = 16.31, p < .001$ . Lawyers in Maricopa County did not differ statistically significantly from those in counties other than Pima County.

<sup>191</sup>  $F(1, 2320) = 4.07, p < .05$ .

<sup>192</sup>  $F(2, 788) = 4.07, p < .05$ . Lawyers involved in a tort non-motor vehicle case gave intermediate responses that did not differ from either.

Across the counties, 37% to 52% of the lawyers thought arbitration was effective in keeping litigants' costs down, whereas 25% to 37% thought arbitration was ineffective in reducing costs. Lawyers in Pima County and counties other than Maricopa County thought arbitration was more effective in reducing clients costs than did lawyers in Maricopa County.<sup>193</sup> Among lawyers who represented clients in arbitration, those who had most recently been involved in a tort case thought arbitration was more effective in reducing litigants' costs than did those who had been involved in a contract case.<sup>194</sup>

<b>Effective in Reducing Litigants' Costs</b>	<b>Maricopa (n = 1956)</b>	<b>Pima (n = 260)</b>	<b>Other Counties (n = 152)</b>	<b>Statewide Total (n = 2447)</b>
1, Extremely ineffective	16.1%	10.4%	11.2%	15.2%
2	20.8%	14.6%	15.8%	19.6%
3	25.8%	23.1%	28.3%	25.7%
4	25.5%	25.8%	29.6%	25.8%
5, Extremely effective	11.9%	26.2%	15.1%	13.6%

Several lawyers commented on arbitration's effect on litigants' costs.

My experience is that motion practice in arbitration is as vigorous as in litigation, and preparation for arbitration is almost as extensive as for trial. Arbitration requires the same expenses, with perhaps an earlier hearing, but appeal is almost guaranteed, thus increasing expenses.

The mandatory arbitration process often leads to double costs to all parties, benefitting the party better able to weather litigation costs and the extended process.

The arbitration program often makes smaller cases impossible to litigate without spending more than the case is worth. Clients see it as a waste of time and money.

It simply becomes another hoop to make the plaintiffs jump through to get any settlement on a tort motor vehicle, so systemically, it probably increases costs.

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<sup>193</sup>  $F(2, 2365) = 17.31, p < .001$ . Lawyers in Pima County did not differ statistically significantly from those in counties other than Maricopa County.

<sup>194</sup>  $F(2, 785) = 11.01, p < .001$ .

Across the counties, 32% to 53% of the lawyers thought arbitration was effective in ensuring that both parties received a fair hearing, while 17% to 28% thought arbitration was ineffective in ensuring a fair hearing. Lawyers in Pima County thought arbitration was more effective in ensuring a fair hearing than did lawyers in counties other than Maricopa County, who in turn thought it was more effective than did lawyers in Maricopa County.<sup>195</sup> Among lawyers who represented clients in arbitration, those who represented the plaintiff in their most recent case were more likely to think arbitration was effective in ensuring a fair hearing than were lawyers who represented the defendant.<sup>196</sup> This was the only goal on which these two groups differed.

<b>Effective in Ensuring Fair Hearing</b>	Maricopa ( <i>n</i> = 1972)	Pima ( <i>n</i> = 260)	Other Counties ( <i>n</i> = 152)	Statewide Total ( <i>n</i> = 2462)
1, Extremely ineffective	8.5%	4.6%	9.3%	8.2%
2	19.9%	11.9%	18.5%	18.9%
3	39.4%	30.4%	27.8%	37.9%
4	24.9%	32.7%	33.1%	26.2%
5, Extremely effective	7.3%	20.4%	11.3%	8.9%

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<sup>195</sup>  $F(2, 2381) = 26.90, p < .001$ .

<sup>196</sup>  $F(1, 800) = 9.74, p < .01$ .

Across the counties, 39% to 41% of lawyers thought arbitration was effective in providing a neutral evaluation to help settle the case, whereas 19% to 30% thought it was ineffective.<sup>197</sup>

<b>Effective in Case Evaluation Aiding Settlement</b>	<b>Maricopa (n = 1946)</b>	<b>Pima (n = 256)</b>	<b>Other Counties (n = 149)</b>	<b>Statewide Total (n = 2430)</b>
1, Extremely ineffective	11.7%	12.5%	9.4%	11.8%
2	18.4%	15.6%	19.5%	18.1%
3	30.9%	31.3%	30.2%	30.7%
4	28.7%	27.0%	28.2%	28.6%
5, Extremely effective	10.3%	13.7%	12.8%	10.8%

Across the counties, 23% to 31% of the lawyers thought arbitration was effective in reducing the time to disposition for cases not subject to arbitration, whereas 28% to 39% thought it was ineffective in this regard. Lawyers in Pima County thought arbitration was more effective in reducing disposition time for other cases than did lawyers in Maricopa County and the other counties.<sup>198</sup>

<b>Effective in Reducing Disposition Time for Other Cases</b>	<b>Maricopa (n = 1803)</b>	<b>Pima (n = 242)</b>	<b>Other Counties (n = 143)</b>	<b>Statewide Total (n = 2258)</b>
1, Extremely ineffective	11.8%	10.3%	11.2%	12.0%
2	22.2%	17.4%	28.0%	22.0%
3	41.5%	40.9%	37.8%	41.2%
4	19.3%	21.9%	17.5%	19.1%
5, Extremely effective	5.2%	9.5%	5.6%	5.7%

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<sup>197</sup> There were no statistically significant differences among the counties ( $F(2, 2348) = .59, p = .55$ ).

<sup>198</sup>  $F(2, 2185) = 3.89, p < .05$ . Lawyers in Maricopa County did not differ statistically significantly from those in counties other than Pima County.

Across the counties, 50% to 59% of the lawyers thought arbitration was effective in allowing the court to devote more resource to cases not subject to arbitration, while 17% to 25% thought arbitration was ineffective in this regard. Lawyers in Pima County lawyers thought arbitration was more effective in allocating court resources to other cases than did lawyers in Maricopa County and the other counties.<sup>199</sup>

<b>Effective in Allocating Court Resources to Other Cases</b>	<b>Maricopa (<i>n</i> = 1879)</b>	<b>Pima (<i>n</i> = 247)</b>	<b>Other Counties (<i>n</i> = 147)</b>	<b>Statewide Total (<i>n</i> = 2347)</b>
1, Extremely ineffective	8.0%	6.5%	6.8%	8.1%
2	13.6%	10.1%	18.4%	13.6%
3	28.2%	24.3%	21.8%	27.4%
4	31.9%	31.6%	33.3%	31.7%
5, Extremely effective	18.4%	27.5%	19.7%	19.3%

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<sup>199</sup>  $F(2, 2270) = 4.83, p < .01$ . Lawyers in Maricopa County did not differ statistically significantly from those in counties other than Pima County.



## **E. Summary: Lawyers' Views of Court-Connected Arbitration**

All members of the State Bar of Arizona were invited in June 2004 to participate in a web-based and e-mail survey about court-connected arbitration in Arizona. The survey findings are based on the responses of 2,934 lawyers who had direct experience with the program (*i.e.*, 31% of State Bar members contacted). The proportion of lawyers responding from each of Arizona's fifteen counties was similar to the proportion of State Bar members in each county; thus, the majority of respondents were from Maricopa County. In this summary, we primarily present statewide findings with only a few examples of county differences.

The survey consisted of three main sections: the first focused on lawyers' experience as counsel in arbitration, the second focused on lawyers' experience as an arbitrator, and the third sought lawyers' views about aspects of arbitration program structure, arbitrator service, and program effectiveness. The number of respondents for each section varied, as a given lawyer could be in a position to answer one, two, or all three sections. We summarize the findings of each section of the survey in turn.

### **1. Lawyers' Experience as Counsel in Arbitration**

\_\_\_\_\_ The first section of the survey was directed at lawyers who represented clients in arbitration and focused on their experience in their most recent case assigned to arbitration. A total of 905 lawyers responded to this section, half of whom had 25% or more of their caseload subject to arbitration and a majority of whom had a civil litigation practice. The lawyers were evenly divided between those who represented the plaintiff and those who represented the defendant in their most recent case in arbitration, except in Pima County, where almost two-thirds had represented the plaintiff.

In their most recent case in arbitration, almost one-third of the lawyers struck an arbitrator, primarily due to concern about the arbitrator's potential bias. A majority of lawyers reported that one or more continuances were granted, which were primarily sought because of scheduling conflicts or the need for additional information for the hearing. There were no differences between Maricopa and Pima Counties in the proportion of cases involving a strike or a continuance, even though Pima County matched arbitrators to cases based on subject matter and assigned cases to arbitration later in litigation.

Most counsel had highly favorable assessments of the arbitration process: they felt they could fully present their case during the hearing, the hearing process was fair, the arbitrator was not biased, and the other side participated in good faith. Lawyers' views of the arbitrator's level of preparation and knowledge of the issues and arbitration procedures were more mixed; few, however, had unfavorable assessments of either the process or the arbitrator.

A majority of the lawyers said that the award was fair and was the same or better than the expected trial judgment, and that their client was satisfied with it. A sizeable minority of lawyers, however, had unfavorable assessments of the award. Among lawyers in cases that did not accept the arbitrator's award, a majority felt the award made no contribution to settlement negotiations.

Lawyers' views of the extent to which the arbitrator understood the issues, was unbiased, was prepared, and knew arbitration procedures were strongly related to lawyers' perceptions that the hearing process and the award were fair. And lawyers' perceptions of the award, the arbitrator's understanding of the issues, and the neutrality and fairness of the arbitrator and the hearing were related to whether lawyers appealed the award.

Lawyers in Pima County tended to have more favorable assessments of the arbitrator and the process than did lawyers in Maricopa County and the other counties. There were no county differences, however, in lawyers' views of the award. Although Pima and Maricopa Counties employed different practices regarding arbitrator selection and assignment, the composition of survey respondents in the two counties also differed. A larger proportion of survey respondents in Pima than in Maricopa County were plaintiffs' counsel and had not appealed the award, both of which were associated with more favorable views. Analyses suggested that differences among the counties in lawyers' views of arbitration were largely, but not entirely, due to these differences in the composition of the survey respondents.

## **2. Lawyers' Experience as Arbitrators**

The second section of the survey focused on lawyers' experience in the most recent case in which they were appointed as an arbitrator. A total of 2,016 lawyers responded to this section, most of whom had served as an arbitrator in one to four cases in the preceding two years. However, unlike the lawyers who responded to the counsel section of the survey, a majority of the arbitrators had little or no experience as counsel in the arbitration process and did not have a civil litigation practice.

Consistent with differences in the courts' practices regarding assigning arbitrators to cases based on subject matter, a majority of arbitrators in Pima County, but fewer than half in Maricopa County and the other counties, said they were very familiar with the subject area in the most recent case they arbitrated. Statewide, a majority of arbitrators felt they had sufficient information about arbitration procedures to conduct an adequate hearing and sufficient information about the facts and the law to reach an informed decision. Not surprisingly, arbitrators in transactional/criminal law practice were less likely than arbitrators in civil litigation practice to be familiar with the law and arbitration procedures and were more likely to report difficulty ruling on motions and dealing with evidentiary and procedural issues.

A majority of arbitrators reported some or a great deal of difficulty scheduling the hearing. One-third ruled on one or more pre-trial motions in their most recent case. Although most arbitrators felt both parties participated in good faith, a number remarked on other problems, including the attorneys' lack of preparation, minimal case presentation, and intent to appeal regardless of the award. A majority of the arbitration hearings lasted two to four hours.

Most arbitrators who did not hold a hearing spent two hours or less on the case. Approximately half of the arbitrators who held a hearing spent a total of five to eight hours on the case, and over one-third spent more than eight hours on the case. Arbitrators who were unfamiliar with arbitration procedures or the area of law or who felt they did not have sufficient information to decide the case spent on average three to five hours longer on cases. A majority of arbitrators in Maricopa County did not submit an invoice for payment, while a majority in the other counties received \$75 for their service.

### **3. Lawyers' General Views of Arbitration**

The final section of the survey sought lawyers' views regarding aspects of program structure, arbitrator service and compensation, and program effectiveness. A total of 2,515 lawyers who had direct experience with court-connected arbitration, primarily as arbitrators rather than as counsel, responded to this section.

Lawyers thought that several aspects of the structure of court-connected arbitration should remain unchanged. A majority of lawyers thought arbitration use should remain mandatory, the jurisdictional limit should remain unchanged, and the time frame for the hearing was about right. Interestingly, there were no differences between lawyers in Maricopa and Pima Counties in their views of the time frame, even though arbitration hearings in Pima County cases generally were held later in the course of litigation. If

arbitration use were made voluntary, a majority of lawyers said they would sometimes or often recommend arbitration to their clients.

However, a majority of lawyers thought arbitration should be replaced by a different type of mandatory ADR process, such as mediation, settlement conference, early neutral case evaluation, or short-trial, to be conducted by *pro tem* judges, commissioners, or other staff neutrals. And just over half of the lawyers thought the appeal disincentive should be changed, although they were split between favoring an increase in the percentage by which an appealing party must improve its outcome versus favoring a decrease in that percentage or abolishing the disincentive altogether.

And a majority of lawyers did not support the current approach to arbitrator service and compensation used in most counties. Most lawyers thought that arbitrator compensation should be changed, either to a reasonable hourly rate for all time spent on the case or to no pay but non-monetary benefits, such as CLE credit or designation as a *pro tem* judge. And a majority of lawyers thought that arbitrator fees should be obtained from sources other than the court's budget, either split equally by the parties or assessed as a taxable cost against the losing party. In addition, a majority of lawyers thought that arbitrators should serve voluntarily, be assigned to cases based on subject matter expertise, and receive arbitration training before serving. Fewer than half of the lawyers said they would be somewhat or very likely to serve voluntarily at the current rate of pay.

Just over one-third of the lawyers thought arbitration was effective in reducing litigant costs, resolving cases faster, ensuring a fair hearing, or providing an evaluation to facilitate settlement. Approximately half of the lawyers felt arbitration was effective in allowing the court to devote more resources to cases not subject to arbitration, but only 25% thought it was effective in reducing disposition time in those cases. Although for most of the goals the percentage of lawyers who thought arbitration was effective was larger than the percentage who thought it was ineffective, a fairly sizeable proportion gave neutral responses. Lawyers in Pima County tended to rate arbitration as more effective than did lawyers in the other counties. To some degree, however, county differences in lawyers' views reflected differences in the composition of the survey respondents.

## V. Court-Connected Arbitration Programs in Other States

Twenty years ago, the idea of using court-connected arbitration as a dispute resolution process for civil cases was novel and *de rigueur*. By the early 1990's, over twenty states had adopted statutes or court rules authorizing trial courts to assign civil cases to non-binding arbitration.<sup>1</sup> As these programs were implemented, a number of states conducted studies to evaluate court-connected arbitration in its various forms. Almost all of these studies were conducted in the 1980's and early 1990's. Since 1995, no state has adopted a new court-connected arbitration program, and at least one state has abandoned its program.<sup>2</sup>

This section of the report describes court-connected arbitration programs in other states. The first subsection summarizes the structural elements of similar court-connected arbitration programs in other states, based on statutes and court rules, and identifies commonalities and differences with Arizona's programs.<sup>3</sup> The second subsection reviews caseload statistics and empirical studies of court-connected arbitration programs in other states to examine their performance and effectiveness.

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<sup>1</sup> See J. McIver & S. Keilitz, *Court-Annexed Arbitration: An Introduction*, 14 JUST. SYS. J. 123 (1991); B. McAllister, "Court-Annexed Arbitration," *Alternate Dispute Resolution in Florida*, vol.I, ch.2 (The Florida Bar, 1995).

<sup>2</sup> Kentucky was the last state court to initiate a court-connected arbitration program, with its adoption of the Uniform Local Rules of the Circuit and District Courts of Boone, Campbell, Gallatin and Kenton Counties in 1995. In 1990, Colorado repealed its court-connected arbitration program. C.R.S.A. §§ 13-22-401-411. Only three federal district courts presently have mandatory arbitration programs. (E-mail from Donna Stienstra, Senior Researcher, Federal Judicial Center, July 6, 2005).

<sup>3</sup> For the most part, this section addresses arbitration programs as they are designed to operate by the state courts and legislatures. There may be local variation in the application and enforcement of statewide rules, as there is in Arizona.

## **A. The Structure of Court-Connected Arbitration in Other States**

The basic structure of court-connected arbitration is the same in all states' programs: a neutral third-party (either a single arbitrator or, less commonly, a panel of three arbitrators) adjudicates the litigants' lawsuit based on a presentation of evidence. In all programs included in this summary, the assignment of specified cases to arbitration is mandatory absent some effort taken by a party to seek exemption from the program. Also, the award is non-binding, in that the litigants retain their right to *de novo* adjudication of the lawsuit by a trial court. Excluded from this summary are court-connected ADR programs dissimilar to Arizona's, such as those where arbitration or some other adjudicatory process is not mandatory but is simply made available to the parties.<sup>4</sup> Also excluded from this summary are programs limited to small claims or cases that could be assigned to limited jurisdiction courts.<sup>5</sup>

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<sup>4</sup> For example, New Hampshire has an ADR program in which the case is assigned to mediation unless the parties stipulate to nonbinding evaluation or binding arbitration during an initial "structuring conference." N.H. Sup. Ct. R. 170(B). Michigan's court-connected ADR program has an adjudicative process, called "case evaluation," that is mandatory for tort lawsuits. It was excluded from this summary because the process is significantly different from Arizona's court-connected arbitration in many respects: parties are not required to attend, rules of evidence do not apply, and oral presentations are limited to 15 minutes per side. M.C.R. 2.403.

<sup>5</sup> Alaska, New York and North Carolina have court-connected arbitration programs that are not addressed in this summary because of their low jurisdictional limits. Alaska's arbitration program is limited to cases under \$3,000, AK ST § 09.43.190, and New York's program applies only to cases under \$6,000 or \$10,000, depending on the court. NYCRR 28.2-16. North Carolina has a mandatory arbitration program that operates primarily in its limited jurisdiction court; arbitration in its general jurisdiction courts is limited to cases under \$15,000. Rule 1, N.C. Arb. R.

## **1. The Scope of Court-Connected Arbitration**

It is common to limit the scope of an arbitration program to cases likely to be relatively simple and straightforward. One way to do this is by prescribing a jurisdictional limit for the arbitration program. As described in Section II, *supra*, Arizona's arbitration program is limited by statute to cases in which the amount in controversy is \$50,000 or less, and different counties have adopted limits from \$50,000 to as low as \$10,000. As seen in the following table, of the eighteen other programs included in this summary, five states have established a jurisdictional limit of \$50,000, five states have lower jurisdictional limits, and four states' limits are higher. Thus, Arizona's jurisdictional limit is in the middle of the range of jurisdictional limits established by other states. Only four programs have no jurisdictional dollar limitation prescribed by statute or court rule.

A second way to keep the more complex cases out of court-connected arbitration is by limiting the programs to specified claims for relief. Most states, including Arizona, accomplish this by excluding cases with claims for non-monetary relief. The following table lists the statutes and court rules governing the states' arbitration programs and summarizes the limitations imposed on the scope of these programs.

While court-connected arbitration, for purposes of this summary, is a mandatory process, many states, including Arizona, allow the parties to bypass court-connected arbitration by agreeing to participate in some other ADR process. For example, they may be exempted from the specific requirements of the court's program by stipulating to be bound by the arbitration award (District of Columbia, Florida, Hawaii) or by agreeing to participate in mediation (Minnesota, Nevada, Oregon). In Delaware, the plaintiff may select from a variety of ADR processes at the time of filing, but the case is assigned to court-connected arbitration if the defendant disagrees with the plaintiff's choice.<sup>6</sup>

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<sup>6</sup> De. Superior Ct. R.C.P. 16.1(c)(2).

<b>Arbitration Programs, By State</b>			
<b>State</b>	<b>Statute/Court Rule</b>	<b>\$ Limit</b>	<b>Cases excluded</b>
<b>AZ</b>	A.R.S. §12-133; A.R.C.P. 72-76	\$ 50,000	non-monetary relief; appeals from ltd. juris. cts.
<b>CA</b>	C.C.P. §1141.10-28 Cal.R.Ct. 1600-1639	\$ 50,000	non-monetary relief; small claims
<b>CT</b>	C.G.S.A. §52-549u-aa; Ct. R. Superior Ct. Civ. § 23-60	\$ 50,000	cases in which a trial by jury is not available or not sought
<b>DE</b>	De. Superior Ct. R.C.P. Rule 16.1	\$100,000	non-monetary claims, unless nominal; statutory penalties
<b>DC</b>	DC R Civ Arb Rules I-XVI	no express limit	equitable relief; small claims; class actions; incarcerated party; landlord/tenant
<b>FL</b>	F.S.A. § 44.103-108; F.S.A. Arbitrator Rule 11.010-130	no express limit	none
<b>GA</b>	Ga. Fulton Co. Rule 1000	\$25,000	domestic relations; medical malpractice
<b>HI</b>	HRS §601-20; H.St.Cir.Ct.Arb. Rules 1-28	\$150,000	non-tort cases
<b>IL</b>	Ill.Sup.Ct. Rules 86-95	limits set by counties	non-monetary claims
<b>KY</b>	ULCR Add. A, Arbitration Rules (Boone, Campbell, Gallatin, and Kenton Counties)	\$100,000	cases less than 3 months old
<b>MN</b>	M.S.A. § 484.73-76; General Rules of Practice for the District Court, Rule 114	no express limit	guardianship, conservatorship, civil commitment, juvenile
<b>NV</b>	N.R.S. § 38.250-259; Nevada Arbitration Rules 1-24	\$40,000	class actions, appeals, probate, domestic relations, equitable or extraordinary relief
<b>NJ</b>	N.J.S. § 39:6-24 and 2A:23A-20; N.J.R.C. Rule 4:21A-1	\$20,000	professional malpractice, cases involving novel legal or complex factual issues
<b>NM</b>	NMRA LR2-601-603 and LR3-701-710	\$25,000	appeals, extraordinary writs, domestic relations, worker's comp, probate, tax (others specified)
<b>OH</b>	Oh. St. R. Sup. Rule 15; Rule 29, Cuyahoga County; Rule 16, Stark County	\$50,000	equitable relief, title to real estate, appeals
<b>OR</b>	O.R.S. § 36.400-36.425; UTCR, Ch. 13	\$50,000	non-monetary claims, appeals
<b>PA</b>	42 Pa..C.S.A. §7361; Pa.R.C.P. 1301-13; Pa..Phila.Civ.R.1301-08	\$50,000	title to real property
<b>RI</b>	RI St §8-6-5; RI R.Arb. Rules	\$100,000	class actions, injunctive or declaratory, family real estate, wills, landlord/tenant
<b>WA</b>	R.C.W. 7.06.010-080; Sup. Court Mandatory Arbitration Rules and Local Rules	\$35,000	non-monetary relief, appeals



## **2. Arbitrator Qualifications and Service**

Although a cornerstone of traditional litigation is the concept of having factual issues decided by a jury of one's peers, court-connected arbitration appears to operate with the premise that the decision maker must have legal expertise. Almost every state requires arbitrators to be licensed lawyers or retired judges.<sup>7</sup> As described in the following table, most states also require a certain level of legal experience, either by setting a minimum number of years of licensure within the state or by specifically prescribing litigation experience. Eleven of the eighteen states with comparable programs require their arbitrators to have more legal experience than does Arizona, which requires only four years of bar membership and does not require arbitrators to have litigation experience.<sup>8</sup> Washington, D.C. is perhaps the most specific in defining the "litigation experience" qualification, requiring its arbitrators to have participated "as lead attorney in at least 3 civil trials of over 4 hours in length in a court of record or in at least 3 hearings of over 4 hours in length before an administrative law judge."<sup>9</sup>

Only two states, Delaware and New Jersey, require lawyers to have experience in the specific subject area in which they will serve as arbitrators. To be assigned to arbitrate personal injury cases in Delaware, lawyers must have experience representing parties in personal injury litigation.<sup>10</sup> New Jersey limits its roster of arbitrators to retired judges or lawyers "having at least seven years of experience in any of the substantive areas of law subject to arbitration."<sup>11</sup>

Service as an arbitrator is voluntary in almost every state. The following table shows that only two states (Delaware and New Mexico) other than Arizona allow courts to require lawyers to serve as arbitrators in their programs.

Not all states specify the compensation of arbitrators in their statutes and court rules. Some simply authorize the court or arbitration commission to set the

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<sup>7</sup> Some states, such as California, Oregon and Washington, allow parties to agree that their case be assigned to a non-lawyer arbitrator. Arizona's arbitration rules include a similar provision, *see* Ariz.R.Civ.P. 73(a), although this exception is rarely employed. Only Nevada and Hawaii allow non-lawyers to be on the arbitration roster and thus available for assignment to cases by the court.

<sup>8</sup> Ariz.R.C.P. 73(b).

<sup>9</sup> D.C. R. Civ. Arb. III(a).

<sup>10</sup> De. Superior Ct. R.C.P. 16.1(h)(2)(A).

<sup>11</sup> N.J.R.C. 4:21A-2(b).

compensation. Minnesota authorizes arbitrators to negotiate their fees directly with the parties, specifying only that the fee be “fair and reasonable.”<sup>12</sup> As shown in the following table, of the states that regulate arbitrator compensation by statute or court rule, few pay their arbitrators less than or the same as Arizona.<sup>13</sup> The states with the most generous arbitrator compensation structures – Delaware (\$150 per hour), Nevada (\$100 per hour), and Rhode Island (\$300 per case) – tend to require the parties to pay the arbitrator’s fee. Conversely, in the states with the lowest compensation structures, the court typically pays the fees.

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<sup>12</sup> Minn. Gen. R. Prac. Superior Ct. 114a.

<sup>13</sup> Ohio and Illinois pay arbitrators \$75 per case, potentially less than the \$75 per hearing day allowed in Arizona.

<b>Arbitrator Selection and Compensation, By State</b>				
<b>State</b>	<b>Experience Required</b>	<b>Service</b>	<b>Compensation</b>	<b>Who pays?</b>
<b>AZ</b>	4 years bar membership	mandatory	\$75/day	court
<b>CA</b>	lawyers, retired judges and retired court commissioners	voluntary	\$150/day	court
<b>CT</b>	admitted to practice in state 5 years and litigation experience	voluntary	\$100/day	- -
<b>DE</b>	5 years active practice; for PI arbitration, PI experience req'd.	mandatory	\$150/hr, min. 2 hrs.	parties
<b>DC</b>	licensed 5 years in any state; lead counsel in at least 3 trials	voluntary	Set by chief judge	court
<b>FL</b>	5 years experience req'd for chief arbitrator only	voluntary	Set by court	parties
<b>GA</b>	2 lists: lawyers with 5 years of trial experience and other lawyers	voluntary	Set by court	court
<b>HI</b>	5 years in state practice and substantial litigation experience	voluntary	- -	- -
<b>IL</b>	3 years trial practice required for chair only	- -	\$75/hearing	- -
<b>KY</b>	licensed in state; lawyers with 5 years experience listed separately	voluntary	\$60-\$90/half day hearing	parties
<b>MN</b>	5 years experience	voluntary	"fair and reasonable" fee negotiated with parties	parties
<b>NV</b>	8 years experience	voluntary	\$100/hr (\$1,000 max)	parties
<b>NJ</b>	7 years experience	- -	\$225-\$350/day	- -
<b>NM</b>	4-5 years experience, depending on county	mandatory	\$100/case	court
<b>OH</b>	3 years experience required for chair only	voluntary	\$75/case	court
<b>OR</b>	5 years bar admission	voluntary	set by arbitration commission	parties
<b>PA</b>	3-5 years experience for chair, 1 year experience for others	voluntary	\$200/day	- -
<b>RI</b>	10 years experience	voluntary	\$300/case	parties
<b>WA</b>	5 years experience	voluntary	set by court—same as judges pro tempore	- -

### **3. The Arbitration Process**

Arbitration is like traditional litigation in that both are adjudicatory processes in which a neutral trier-of-fact decides the case based on the parties' presentations of evidence and arguments in an adversarial hearing. Although in a few states arbitration is very similar to litigation except for the identity of the trier-of-fact and the non-binding nature of the result, in most states arbitration is distinguished from traditional litigation in that the process is expedited and more informal. In Arizona, for example, the Supreme Court has characterized court-connected arbitration as a "more efficient and cost-effective" way of resolving disputes, "something short of a full-blown adversary proceeding."<sup>14</sup> States differ in how they structure the arbitration process in order to create efficiencies or make the process more user-friendly. In most states, the rules governing pretrial procedures and the admissibility of evidence are relaxed and in a few states the presentation of the case may be limited. To promote the faster resolution of cases, almost all states regulate the timing of the arbitration hearing by setting hearing deadlines, regulating continuances, or allowing the arbitrator to limit discovery.

It is difficult to compare restrictions on the timing of the arbitration hearing from state to state because they do not use uniform starting points for their deadlines. As seen in the following table, few states calculate the arbitration hearing deadline from the time of filing the complaint; these tend to require the hearing to be conducted within six to twelve months. Instead, most states use the appointment of the arbitrator as the event triggering the deadline for the arbitration hearing and typically require the hearing to be conducted within 45 to 120 days. Arizona follows the latter approach, with hearings to be conducted between 60 and 120 days following the appointment of the arbitrator. However, as described in section II, *supra*, there is no standard for when in the course of litigation the arbitrator should be appointed, and practices vary from county to county. As a result, a short deadline from the arbitrator's appointment does not necessarily translate into hearings being conducted early in the litigation. In Cuyahoga County, Ohio, for example, the hearing must be conducted within 90 days of the referral of the case to arbitration; however, all discovery must be completed and the case must be ready for trial before it is referred to arbitration.<sup>15</sup>

A short hearing deadline may not produce a more efficient process if it forces parties to participate in arbitration without adequate preparation and, as result, increases the number of requests for trial *de novo*. Some states are creative in their efforts to

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<sup>14</sup> *Martinez v. Binsfield*, *supra*, 196 Ariz. at 467. See Section I, fn.2 and accompanying text.

<sup>15</sup> Cuy. Cty. Common Pleas Gen. R. 29(I)(D) and (V)(A).

establish an expedited process while allowing the parties a fair opportunity to exchange and discover information about the case. In Delaware, the arbitrator is appointed early in the lawsuit, after the pleadings stage, and the hearing is supposed to take place within 90 days following the appointment.<sup>16</sup> Anticipating the problems this schedule might create in personal injury cases, the rule specifies that if a defendant has requested an independent medical examination of the plaintiff, the hearing may instead be scheduled within thirty days of the arbitrator's receipt of the physician's report.<sup>17</sup>

Another way to control the timing of the arbitration hearing is to regulate continuances. For example, in the District of Columbia, where the hearing is supposed to take place between 60 and 120 days following the arbitrator's appointment, the arbitrator is allowed to grant continuances upon the request of a party and a showing of good cause, so long as the hearing is held within the 120 day period.<sup>18</sup> The arbitrator may continue a hearing up to 60 days beyond the 120-day limit, but only upon a party's showing of exceptional circumstances. Continuances for more than 60 days beyond the 120-day limit must be decided by the judge, based on the arbitrator's recommendation.<sup>19</sup> Arizona has a similar restriction, allowing the arbitrator to rule on motions to continue the arbitration hearing, but only up to the point the extension does not impact deadlines that govern when civil cases must be set for trial.<sup>20</sup>

Many states allow arbitrations to be conducted without strict adherence to the court rules governing discovery. Some states, including Arizona, allow the arbitrator to limit discovery in order to provide for the "efficient and inexpensive handling of small claims."<sup>21</sup> In Nevada, the parties are required to meet with the arbitrator within 30 days of appointment to formulate a discovery plan, and the rule empowers the arbitrator to exercise discretion in limiting discovery so that it is "neither costly nor burdensome."<sup>22</sup>

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<sup>16</sup> D. Superior Ct. R. 16.1(k).

<sup>17</sup> *Id.*

<sup>18</sup> D.C.R. Civ. Arb. IX(d).

<sup>19</sup> *Id.*

<sup>20</sup> Ariz.R.Civ.P. 74(a). Of course, in counties in which the arbitrator is appointed after the motion to set the case for trial already has been filed, this rule will not constrain the timing of hearings.

<sup>21</sup> *Id.*

<sup>22</sup> Nev.Arb.R. 11(a). Other states that grant the arbitrator discretion to limit pre-hearing discovery include New Mexico, *see* N.M.R.A. LR2-603(V)(A)(2), and Washington, *see* W.S.C. Man.

Almost all states make some effort to lighten the cost of preparing for the arbitration hearing by relaxing the rules of evidence in some way. While some states specify that the rules of evidence apply at arbitration hearings, most of those states, including Arizona, list exceptions to the rules in order to allow certain documentary evidence to be admitted without rigid foundational requirements.<sup>23</sup> The majority of states simply allow informal presentations of the parties' cases in arbitration or direct that the rules of evidence should be liberally construed. A description of the various ways the states apply procedural and evidentiary rules to arbitration is included in the second column of the following table.

A common element of every mandatory court-connected arbitration program is the preservation of the parties' right to a trial *de novo* if they wish to reject or appeal the arbitrator's award. This non-binding feature creates the possibility that arbitration might make litigation more costly and time-consuming, particularly if arbitration awards are routinely appealed or hearings are not taken seriously. Some states address this potential problem by imposing a "good faith" participation requirement, violation of which could result in monetary sanctions (Delaware, Hawaii, Minnesota, New Mexico, Rhode Island) or waiver of the party's right to a trial *de novo* (Arizona, Illinois) or both (Nevada).

More common is the provision of an "appeal disincentive," either by way of a substantial filing fee as a condition of appeal or the assessment of the opposing party's costs and fees if the appeal does not produce a more favorable result. Five states, including Arizona, require that the appealing party improve its position by a specified percentage, ranging from 10% to 30%, to avoid liability for the opposing party's fees and costs on appeal. Another five states require that the appealing party simply obtain a more favorable result to avoid liability for fees and costs. New Jersey is one of the few states that is explicit about the application of the appeal disincentive to parties who were denied money damages in arbitration: costs and fees are avoided if the appealing party obtains a verdict of at least \$250 at the trial *de novo*.<sup>24</sup> A complete list of the states' appeal disincentive provisions is included in the last column of the table that follows.

A few states have developed elaborate mechanisms to encourage efficiency without unduly interfering with parties' rights to access the courts. For example, Nevada discourages appeals of cases involving smaller amounts of money by providing graduated

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Arb. R. 4.2.

<sup>23</sup> Ariz.R.Civ.P. 74(g)

<sup>24</sup> N.J.R.C. Rule 4:21A-6(c).

disincentives: for cases in which the arbitration award is \$20,000 or less, the party requesting the trial *de novo* must improve its position by at least 20% to avoid liability for the opposing party's fees and costs on appeal. For cases in which the award is more than \$20,000, the appeal disincentive drops to 10%.<sup>25</sup> As shown in the following table, several states limit the potential severity of their appeal disincentives by capping the award of fees if the appealing party does not improve its position. For example, New Jersey limits the award of fees to \$750 in total or \$250 per day,<sup>26</sup> and Hawaii caps the award of fees at \$15,000.<sup>27</sup> In Oregon, the cap on fees awarded by the court varies depending on who requests the trial *de novo*: the fees may not exceed 20% of the judgment if the defendant appeals or 10% of the amount claimed in the complaint if the plaintiff appeals.<sup>28</sup>

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<sup>25</sup> N.Arb.R. 20(A)(2).

<sup>26</sup> N.J.R.C. Rule 4:21A-6(c).

<sup>27</sup> H.St.Cir.Ct.Arb.R. 26(B)(3).

<sup>28</sup> O.R.S. § 36.425(5).

<b>Arbitration Procedure, By State</b>			
<b>State</b>	<b>Timing of Hearing or Award</b> (Hearing = “H”; Award = “Aw”; appointment of arbitrator = “appt”)	<b>Rules of Procedure/Evidence</b>	<b>Appeal Disincentive</b> (To avoid liability for fees, unless otherwise specified)
<b>AZ</b>	H: 60-120 days after appt; Aw: 145 days after appt	discovery may be limited; rules of evidence apply with exceptions	appealing party must improve by 25%.
<b>CA</b>	H must be <90 days after appt, but may not be <210 days after filing	hearings shall be as informal as possible, rules of evidence apply with exceptions	trial result must be more favorable
<b>CT</b>	decision must be filed w/in 120 days after the H	strict adherence to rules of evidence not required	- -
<b>DE</b>	H w/in 90 days of appt or within 30 days of IME report	rules of evidence used as a guide	trial result must be more favorable (costs of arb only)
<b>DC</b>	H 60-120 days after appt	informal discovery encouraged; strict adherence to rules of evidence not required	- -
<b>FL</b>	H w/in 120 days of initial scheduling conference	parties may give complete but informal presentations of their cases	trial result must be more favorable
<b>GA</b>	within such time as may be ordered by the Court	testimony may be admitted by way of summarization by the lawyer	appealing party must improve by 15%
<b>HI</b>	w/in 9 months of service on all defendants	rules may be relaxed to expedite case and should be liberally construed	appealing party must improve by 30%, but fees capped at \$15,000
<b>IL</b>	H must be w/in 1 year of filing	rules of evidence apply	(filing fee of \$200 for awards of \$30,000 or less; \$500 for others)
<b>KY</b>	H must be within 90 days of appt	strict conformity to rules of evidence not necessary	- -
<b>MN</b>	arbitrator must promptly schedule H after appt	rules of evidence construed liberally	- -
<b>NV</b>	Aw must be filed no later than 6 months after appt	arbitrator may limit discovery; rules of evidence relaxed	must improve by 20%, or by 10% for awards over \$20K
<b>NJ</b>	H not <45 days from appt and not >60 days after discovery ends	parties are not bound by rules of evidence	must improve by 20% or must get verdict of at least \$250
<b>NM</b>	Aw must be filed w/in 120 days of appt	arbitrator may limit discovery; rules of evidence apply with specified exceptions	trial result must be more favorable
<b>OH</b>	H within 90 days following referral to arbitration	strict conformity to rules of evidence not required	(appellant must pay filing fee and arbitrator’s fees)
<b>OR</b>	H must take place between 14 and 49 days from the appt	hearing to be informal and expeditious; arbitrator has discretion to apply rules of evidence	must improve position, but fees are capped on appeal
<b>PA</b>	set by local rule	rules of evidence apply with exceptions for specified documents	(appellant must pay arbitrator’s fee, not to exceed 50% of claim)
<b>RI</b>	H must be concluded w/in 270 days following close of pleadings.	rules of evidence serve only as a guide; authentication of documents not required	(\$200 filing fee forfeited if position not improved)
<b>WA</b>	H must take place between 21 and 63 days after appt	discovery allowed only when reasonably necessary; rules of evidence liberally construed	trial result must be more favorable



## **B. Program Performance: Empirical Data on Court-Connected Arbitration in Other States**

This section reviews the empirical studies and reports of case processing statistics for court-connected arbitration programs in other states. We begin with a brief description of the studies reviewed, including their data sources and methodology. Then we report case processing statistics to provide a sense of the rate at which arbitration cases went to a hearing, filed an appeal, and had a trial *de novo*. Next, we present the empirical findings regarding the arbitration programs' impact on time to disposition, court resources, and litigant costs. We also report lawyers' and litigants' views of arbitration. In each of these sections, we discuss aspects of program structure that might have contributed to different findings in different studies. We conclude by summarizing the findings of arbitration programs in other states.

## **1. Studies and Case Processing Reports Reviewed**

The empirical studies and reports of case processing statistics for court-connected arbitration programs in other states are listed in the following table.<sup>29</sup> The primary data source for most of the studies and reports was court or arbitration program records. Several of the studies supplemented case information with questionnaire data from attorneys, and a few also surveyed litigants.

Only two studies involved the random assignment of arbitration-eligible cases to either an arbitration or a non-arbitration group.<sup>30</sup> In one of these studies, however, the arbitration and non-arbitration groups were not entirely comparable because about one-fourth of the cases initially assigned to the arbitration group were removed from arbitration at a later time, some because they were complex cases; these types of cases, however, were not removed from the non-arbitration group.<sup>31</sup> Four studies compared arbitration cases with arbitration-eligible cases that had been filed before the arbitration program began.<sup>32</sup> Findings obtained using a pre/post research design, however, could be the result of changes other than arbitration that occurred between the two time periods. The remaining studies and all of the caseload reports had data only for arbitration cases.<sup>33</sup>

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<sup>29</sup> The table lists which studies or reports apply to which states. Few studies reported statewide data; most involved a subset of courts in the state, and some involved only one court. Multiple studies were conducted in some states, although they did not necessarily include the same courts. When multiple studies were conducted on a single program, the findings of only one of the studies are reported here, with the exception of case processing statistics. If multiple reports were written for a single study, only one report is cited for any given issue, even if several of the reports contained the same finding, so that the reader can more easily discern the number of studies supporting a particular finding. We did not review studies of arbitration in federal district courts because of differences in case types and court resources.

<sup>30</sup> Barkai & Kassebaum, 1991, at 135; Clarke et al., 1991, at 157-8.

<sup>31</sup> Where possible, the researchers included in the arbitration group data from the cases that had been excluded so that the cases would be more comparable. Barkai & Kassebaum, 1992, at iv-v.

<sup>32</sup> Burton & McIver, 1990, at 4-6; Collins et al., 1992, at 26-27; Gatowski et al., 1996, at 291-292; Hanson & Keilitz, 1991, at 208-9. For the Hanson & Keilitz study, we primarily reported findings from arbitration cases filed after the program start date, as they provide a more accurate picture of the arbitration program's effects than the findings that included a large number of pending cases referred to arbitration when the program began.

<sup>33</sup> One additional study had arbitration and non-arbitration comparison groups; however, the non-arbitration group included cases that exceeded the arbitration program's jurisdictional limit. MacCoun et al., 1988, at 13-15. Given the lack of comparability of these cases, the only findings from this study that are reported here are those that discuss findings for arbitration cases

The arbitration programs varied greatly on a number of dimensions, including the jurisdictional limit, type of cases eligible for the program, arbitrator selection and assignment, the timing of the hearing, and the nature of the disincentives to appeal. In addition, there undoubtedly was variation among the courts in other aspects of case management, as well as in their local legal culture. Only a few studies systematically assessed the impact of different program structures on case processing in arbitration; none examined their impact on program performance. Differences among the programs on multiple dimensions make it difficult to draw clear conclusions about the effect of any single program feature by comparing findings across the programs, as any one characteristic could either mask or enhance the effects of other characteristics.

Almost all of the studies were conducted over a decade ago. Accordingly, the structure of the programs at the time of the studies might be different than their present structure. The jurisdictional limit was lower when many of the studies were conducted than at present.<sup>34</sup> In the New Jersey program, the types of cases eligible for arbitration expanded over time.<sup>35</sup> Some of the studies do not provide information about all aspects of the structure of the program, making it difficult to know whether or how they changed over time, as well as limiting comparisons among programs. If there have been changes in the arbitration program or in other aspects of the court's case management since the studies were conducted, these older findings might not still hold true in the context of the program's present operation. Such changes might affect some outcome dimensions, such as court resources and litigation costs, more than others. Thus, conclusions about the arbitration programs' performance that are based on the studies and reports reviewed here may not necessarily apply today.

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only.

<sup>34</sup> See *supra* Section V.A. Even among the reports reviewed here, the jurisdictional limit had changed over time in several states (*e.g.*, California, Illinois, Nevada, New Jersey).

<sup>35</sup> Initially, only automobile negligence cases were eligible for arbitration. See MacCoun et al., 1988; MacCoun, 1991. The program was expanded to include other personal injury and contract cases. See Roehl et al., 1991 and NJSBA, 2003.

<b>Sources of Data on Court-Connected Arbitration in Other States</b>	
<b>State</b>	<b>Empirical Study or Case Statistics Reports Reviewed</b>
<b>CA</b>	<p>Deborah R. Hensler et al., <i>Judicial Arbitration in California: the First Year</i> (1981)</p> <p>Judicial Council of California, <i>Report and Recommendation on Effectiveness of Judicial Arbitration</i> (1983). (Reprinted in Patricia A. Ebener &amp; Donna R. Betancourt, <i>Court-Annexed Arbitration: The National Picture</i> (1985))</p> <p>David L. Bryant, <i>Judicial Arbitration in California: An Update</i> (1989)</p> <p>Task Force on the Quality of Justice Subcommittee on Alternative Dispute Resolution and the Judicial System, <i>Alternative Dispute Resolution in Civil Cases</i> (1999)</p>
<b>CO</b>	<p>Lloyd Burton &amp; John McIver, <i>The Impact of Court-Annexed Arbitration on the Administration of Civil Justice in Colorado</i> (1990)</p> <p>Lloyd Burton, et al., <i>Mandatory Arbitration in Colorado: An Initial Look at a Privatized ADR Program</i>, 14 JUST. SYS. J. 183 (1991)</p>
<b>GA</b>	<p>Roger A. Hanson &amp; Susan Keilitz, <i>Arbitration and Case Processing Time: Lessons From Fulton County</i>, 14 JUST. SYS. J. 203 (1991)</p> <p>Craig Boersema et al., <i>State Court-Annexed Arbitration: What Do Attorneys Think?</i> 75 Judicature 28 (1991)</p>
<b>HI</b>	<p>John Barkai &amp; Gene Kassebaum, <i>Pushing the Limits on Court-Annexed Arbitration: The Hawaii Experience</i>, 14 JUST. SYS. J. 133 (1991)</p> <p>John Barkai &amp; Gene Kassebaum, <i>Hawaii's Court-Annexed Arbitration Program Final Evaluation Report</i> (1992)</p>
<b>IL</b>	<p>John N. Collins et al., <i>Illinois Supreme Court - DuPage County, Mandatory Court-Annexed Arbitration Project: Final Evaluation Report</i> (1992)</p> <p>Center for Analysis of Alternative Dispute Resolution Systems (CAADRS), <i>Pilot Mandatory Arbitration Program Expansion - \$30,000 to \$50,000 Cases, 18th Judicial Circuit</i> (last revised 8/24/04). Available at <a href="http://www.caadrs.org/adr/DuPage_arb.htm">http://www.caadrs.org/adr/DuPage_arb.htm</a>.</p>
<b>NV</b>	<p>John S. DeWitt et al., <i>The Impact of Court-Annexed Arbitration on the Pace, Cost, and Quality of Civil Justice in Clark County, Nevada</i> (1994)</p> <p>Sophia I. Gatowski et al., <i>Court-Annexed Arbitration in Clark County, Nevada: An Evaluation of Its Impact on the Pace, Cost, and Quality of Civil Justice</i>, 18 JUSTICE. SYST. J. 287 (1996)</p> <p>L. Christopher Rose, <i>Nevada's Court-Annexed Mandatory Arbitration Program: A Solution to Some of the Causes of Dissatisfaction with the Civil Justice System</i>, 36 IDAHO L. REV. 171 (1999)</p>
<b>NH</b>	<p>Roger Hanson et al., <i>The Role of Management in State Court-Annexed Arbitration</i>, 11 STATE COURT J. 14 (1988)</p>
<b>NJ</b>	<p>Robert J. MacCoun et al., <i>Alternative Adjudication: An Evaluation of the New Jersey Automobile Arbitration Program</i> (1988)</p> <p>Robert J. MacCoun, <i>Unintended Consequences of Court Arbitration: A Cautionary Tale from New Jersey</i>, 14 JUST. SYS. J. 229 (1991)</p> <p>Janice A. Roehl, et al., <i>Evaluation of New Jersey's Expanded Arbitration Program: Final Report</i> (1991)</p> <p><i>New Jersey Stat Bar Association Ad Hoc Committee on Arbitration, NJSBA Report on Arbitration</i> (NJSBA) (2003), available at <a href="http://www.njsba.com./activities/index.cfm?fuseaction=arbitration">http://www.njsba.com./activities/index.cfm?fuseaction=arbitration</a></p>

<b>Sources of Data on Court-Connected Arbitration in Other States (continued)</b>	
<b>State</b>	<b>Empirical Study or Case Statistics Reports</b>
<b>NM</b>	William P. Lynch, <i>Problems with Court-Annexed Mandatory Arbitration: Illustrations from the New Mexico Experience</i> , 32 N.M. L. Rev. 181 (2002)
<b>NC</b>	Stevens H. Clarke et al., <i>Court-Ordered Arbitration in North Carolina: An Evaluation of Its Effects</i> (1989) Stevens H. Clarke et al., <i>Court-Ordered Arbitration in North Carolina: Case Outcomes and Litigant Satisfaction</i> , 14 JUST. SYS. J. 154 (1991)
<b>OR</b>	Christopher Simoni et al., "Litigant and Attorney Attitudes Toward Court-Annexed Arbitration: An Empirical Study," 28 <i>Santa Clara Law Review</i> 543- 579 (1988) Brian Smith et al., <i>Court Annexed Arbitration Evaluation Study: Final Report</i> (1992)
<b>PA</b>	E. Allan Lind et al., <i>In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System</i> , 24 LAW & SOC'Y. REV. 953 (1990)
<b>WA</b>	Pam Daniels, <i>Evaluation of the Effectiveness of the Existing Court-Annexed Arbitration Program</i> (1998)

## **2. The Progression of Arbitration Cases Through Hearing, Appeal, and Trial *De Novo***

Case processing statistics were examined to get a sense of the progression of cases through the arbitration process. As seen in the following table, the percentage of arbitration cases that went to a hearing ranged from 15% to 64%, with most hearing rates between 40% and 64%. The percentage of cases in which an award had been filed that subsequently requested a trial *de novo* ranged from 19% to 78%, with most appeal rates between 25% and 60%. In virtually all studies that reported this information, a majority of the appeals were filed by the defendant.<sup>36</sup> Finally, the percentage of appealed cases that had a trial *de novo* ranged from 3% to 45%.<sup>37</sup> The trial *de novo* rate was less than 25% in about half of the reports and greater than 25% in the other half.

Studies that examined whether the appellant's position improved at trial *de novo* relative to the arbitration award reported mixed findings. One study reported that 67% of appellants improved their position at trial,<sup>38</sup> while another reported that the trial verdict and arbitration award were in agreement 68% of the time.<sup>39</sup> A third study reported that only 40% of plaintiffs, compared to 70% of defendants, improved their position at trial.<sup>40</sup> Thus, outcomes favoring the defense seemed to be more likely in trial verdicts than in arbitration awards.<sup>41</sup>

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<sup>36</sup> Judicial Council of California, 1983, at A-68 (45%); Burton & McIver, 1990, at 23-24 (50% - 69% across districts); MacCoun, 1991, at 236 (56%); Gatowski et al., 1996, at 296 (61%); Collins et al., 1992, at 61 (63%); Lynch, 1992, at 187 (approximately two-thirds); Rose, 1999, at 178-179 (67%); NJSBA, 2003 (from 55% in 1987 to 82% in 2003).

<sup>37</sup> We did not report the trial rate for studies in which a sizeable number of cases were still pending. We did not include one study in the above table because that arbitration program was the only one in which the arbitrators were sitting judges. However, it is interesting to note that the appeal rate in that program was 77%, among the highest of any program. See Hanson et al., 1988, at 5.

<sup>38</sup> Clarke et al., 1991, at 159. The amount of improvement was not documented.

<sup>39</sup> MacCoun, 1991, at 235. Whether "agreement" referred to liability or damages or both was not specified.

<sup>40</sup> Judicial Council of California, 1983, at A-56. An earlier study in California similarly reported that the plaintiff's position was worse at trial in 65% of cases. See Hensler et al., 1981, at 88.

<sup>41</sup> MacCoun, 1991, at 235; Judicial Council of California, 1983, at A-56.

<b>Arbitration Case Processing Statistics</b>			
<b>State - Study</b>	<b>Hearing Rate (% of cases assigned to arb.)</b>	<b>Appeal Rate (% of awards appealed)</b>	<b>% of appeals tried</b>
CA - Judicial Council of CA, 1983, at A-68	62%	50%	--
CA - Bryant, 1989, at 16, 24 (average across counties)	55%	59%	3%
CA - Task Force, 1999, at 62 (average across counties)	--	--	22%
CO - Burton & McIver, 1990, at 23-24, 28 (average across districts)	--	38%	14%
GA - Hanson & Keilitz, 1991, at 214-225	64%	43%	33%
HI - Barkai & Kassebaum, 1992, at 59	22%	56%	3%
IL - Collins et al., 1992, at 7-8	--	33%	40%
IL - CAADRS, 2004	15%	39%	33%
NV - Gatowski et al., 1996, at 295-296 (of non-pending cases)	52%	29%	--
NV - Rose, 1999, at 178-179 (1992-1998 average)	48%	47%	--
NJ - MacCoun, 1991, at 236	55%	57%	10%
NJ - Roehl et al., 1991, at 38, 40 (average across counties)	--	78%	"few"
NJ - NJSBA, 2003 (using only 2000-01 data)	58%	72%	6%
NM - Lynch, 2002, at 186 (data from 1992-1999)	32% - 50%	23% - 33%	- -
NC - Clarke et al. 1991, at 159	52%	19%	45%
OR - Simoni et al., 1988, at 557, N.73	50%	28%	32%
OR - Smith et al., 1992, at 63-64	42%	26%	- -
WA - Daniels, 1998, at 16-17	--	37%	- -

Several studies examined whether the claim amount or the type of case was related to whether cases went to an arbitration hearing or requested a trial *de novo*. Several studies found that cases involving larger dollar amounts were more likely to go to an arbitration hearing rather than to conclude before the hearing<sup>42</sup> and were more likely to appeal the award.<sup>43</sup> One study found that more complex cases were more likely to have an arbitration hearing than to settle before it.<sup>44</sup> Another study found no difference in the rate of appeal or trial *de novo* between contract and personal injury cases.<sup>45</sup>

It is instructive to review in more detail the findings of one of the above studies that examined whether cases involving different dollar claims had a different rate of hearing, appeal, and trial *de novo*.<sup>46</sup> As part of a pilot program, the jurisdictional limit for arbitration in this court was raised from \$30,000 to \$50,000. Accordingly, the study examined how cases in the \$30,000 to \$50,000 range progressed through arbitration compared to cases in the \$5,000 to \$30,000 range. The cases involving larger claim amounts went to an arbitration hearing at a higher rate (37% vs. 15%) and were more likely to appeal the award (66% vs. 37%) than were the cases involving smaller claim amounts. However, on appeal, the larger cases were less likely to go trial than were the smaller cases (17% vs. 35%). But when calculated as a percentage of all cases assigned to arbitration, the trial rate was 4% for the larger cases and 2% for the smaller ones.

Looking across programs, there did not appear to be a consistent pattern between the timing of the hearing and the percentage of cases in which a hearing was held. Nor did requiring a pre-hearing settlement conference consistently reduce the percentage of cases that went to an arbitration hearing.<sup>47</sup> The appeal rate did not seem to vary with the nature of the appeal disincentive, but the rate of trial *de novo* did. Programs with the highest rate at which trials *de novo* were held tended to be those in which the appellant only had to pay a small filing fee or deposit upon appeal. Conversely, some of the programs with the lowest rate of trial were those with the largest percentage by which appellants had to improve their positions at trial. These conclusions should be considered tentative, however,

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<sup>42</sup> CAADRS, 2004; Collins et al., 1992, at 58-59.

<sup>43</sup> CAADRS, 2004; Hanson & Kelitz, 1991, at 226 (finding that awards above \$25,000 were more likely to be appealed than awards below that amount); MacCoun et al., 1988, at 26 (finding that auto negligence cases with medical specials above \$2,500 were more likely to appeal the award than were cases with claims below that amount).

<sup>44</sup> Barkai & Kassebaum, 1991, at 9.

<sup>45</sup> Burton & McIver, 1990, at 23-24.

<sup>46</sup> CAADRS, 2004.

<sup>47</sup> Bryant, 1989, at 15-16; Hensler et al., 1981, at 45.



because of the difficulty of attributing differences between programs to any single factor. For instance, based on comparisons across programs, we would have been likely to conclude that there was no effect of jurisdictional limit on hearing or appeal rates, but the systematic examination of claim amount within programs revealed that factor did have an effect.

### **3. Arbitration's Impact on Time to Disposition**

Five studies reported that arbitration cases had a shorter time to disposition than did cases not in arbitration. Three of these studies found that arbitration cases were resolved about three months faster than non-arbitration cases.<sup>48</sup> For one of these studies, however, only contested cases had a shorter time to disposition in arbitration; for non-contested cases, there was no difference between arbitration and non-arbitration cases in the time to disposition.<sup>49</sup> Because non-contested cases comprised approximately three-fourths of the cases, it is likely that the difference in time to disposition between arbitration and non-arbitration cases would have been reduced or eliminated if the analysis had been conducted on all cases. A fourth study, which looked only at contested cases, found that arbitration cases were concluded seven months faster than non-arbitration cases.<sup>50</sup> The final study did not specify how much faster arbitration cases were resolved when all arbitration dispositions were included.<sup>51</sup>

However, three studies found essentially no difference in the time to disposition for arbitration versus non-arbitration cases.<sup>52</sup> Arbitration case terminations particularly lagged behind non-arbitration terminations during the first few months after the complaint.<sup>53</sup>

We explored whether differences in arbitration program structure were associated with time savings in arbitration; as noted earlier, these conclusions should be considered tentative, at best.<sup>54</sup> Three features were more likely to be present in programs that reported

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<sup>48</sup> Barkai & Kassebaum, 1992, at 37; Clarke et al., 1991, at 160; Collins et al., 1992, at 68. Although this was true for all arbitration dispositions, cases in arbitration that appealed the award had a longer time to disposition than did non-arbitration cases. *See* Barkai & Kassebaum, 1992, at 37.

<sup>49</sup> Clarke et al., 1987, at 35-37.

<sup>50</sup> Gatowski et al., 1996, at 294-295.

<sup>51</sup> Burton & McIver, 1990, at 17. Comparing only arbitration cases that went to an arbitration hearing with non-arbitration cases that went to trial, this study found that arbitration cases were resolved two to nine months faster, depending on the court. However, among only cases that went to trial, the time to disposition was longer for arbitration cases than for non-arbitration cases. *Id.* at 92.

<sup>52</sup> Hanson et al., 1991, at 6; Hanson & Keilitz, 1991, at 216; Judicial Council of California, 1983, at A-56.

<sup>53</sup> Hanson & Keilitz, 1991, at 219.

<sup>54</sup> In addition, our comparison was not based on complete information; some studies or some program components could not be considered because the program structure was not

arbitration reduced the time to disposition relative to non-arbitration cases than in programs that reported no time savings. First, programs in which arbitration cases were resolved more quickly were more likely to place limits on the amount of discovery or the length of time to complete discovery, or gave the arbitrator total control over what discovery could be conducted.<sup>55</sup> Second, some of the programs reporting time savings had relatively short deadlines by which the arbitration hearing had to be held.<sup>56</sup> Third, some of the programs in which arbitration cases were resolved faster had court staff schedule or coordinate the scheduling of the arbitration hearing.<sup>57</sup>

In addition, programs reporting a shorter time to disposition in arbitration cases than in non-arbitration cases tended to have a low hearing rate or a low appeal rate in arbitration (though not both).<sup>58</sup> By contrast, programs reporting no time to disposition differences between arbitration and non-arbitration cases tended to have both a high hearing rate and a high appeal rate in arbitration.<sup>59</sup> This pattern is consistent with finding that the point in the arbitration process at which cases were resolved affected their time to disposition. Arbitration cases that settled before the arbitration hearing were concluded one to two months faster than cases that accepted the award, and two to six months faster than all cases that went to a hearing.<sup>60</sup> Cases that accepted the arbitration award were resolved faster than cases that requested a trial *de novo* – from three to ten months faster, depending on whether

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described in sufficient detail.

<sup>55</sup> Barkai & Kassebaum, 1992, at 84; Burton & McIver, 1990, at 187; Gatowski et al., 1996, at 290. Two of these programs had an early pre-hearing conference where the arbitrator decided what discovery could be conducted. See Barkai & Kassebaum, 1992, at 2; Gatowski et al., 1996, at 290.

<sup>56</sup> Burton & McIver, 1990, at 185-186 (90 days after answer); Clarke et al., 1991, at 156 (60 days after answer); Collins et al., 1992, at 2 (180 days after complaint). The existence of such deadlines, however, was no guarantee that they were met: one study reported that about two-thirds of hearings were held when required, but another study found only 9% of cases met the deadline. See Barkai & Kassebaum, 1992, at 38; Burton & McIver, 1990, at 35. One of the studies that did not report time savings said there was great variation among the courts in whether deadlines were monitored or enforced. See Bryant, 1989, at 15-16.

<sup>57</sup> Clarke et al., 1991, at 156; Collins et al., 1992, at 18.

<sup>58</sup> Barkai & Kassebaum, 1992, at 59; Burton & McIver, 1990, at 23-24, 28; Clarke et al., 1991, at 159; Collins et al., 1992, at 7-8; Gatowski et al., 1996, at 295-296.

<sup>59</sup> Hanson et al., 1991, at 5; Hanson & Keilitz, 1991, at 214-225; Judicial Council of California, 1983, at A-68.

<sup>60</sup> Barkai & Kassebaum, 1992, at 37; Collins et al., 1992, at 8-9; Gatowski et al., 1996, at 294-296; Hanson & Keilitz, 1991, at 220-222; MacCoun et al., 1988, at 35.

the comparison was cases that settled on appeal or cases that went to trial.<sup>61</sup> Although one study found that appealed cases that settled before trial were resolved five months faster than those that went to trial, two other studies found little or no difference in the time to disposition for these two groups of cases.<sup>62</sup>

The jurisdictional limit did not seem to effect whether arbitration cases were resolved faster, as the jurisdictional limits in the programs that reported time savings ranged from \$15,000 to \$150,000. Nor did the type of case seem to be related to the speed of disposition: among the programs reporting time savings, some handled only tort cases, others handled primarily debt collection cases, and others handled both types of cases.

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<sup>61</sup> Barkai & Kassebaum, 1992, at 37; Burton & McIver, 1990, at 30; Collins et al., 1992, at 8-9; Hanson & Keilitz, 1991, at 220-222.

<sup>62</sup> Burton & McIver, 1990, at 30; Collins et al., 1992, at 8-9; Hanson & Keilitz, 1991, at 220-222.

#### **4. Arbitration's Impact on Court Resources**

One study compared the estimated costs to the court of processing cases through arbitration versus through the usual litigation route.<sup>63</sup> The researchers estimated the cost of litigation to be \$300 per case, taking into consideration the administrative costs of processing cases in the clerk's office, and the time spent on trials by court clerks, clerk's office staff, judges, and court reporters. By contrast, they estimated cost of the arbitration program at \$256 per case, including the arbitration administration staff, arbitrator fees and training costs. The researchers noted, however, that the apparent savings in arbitration would be reduced or eliminated if their estimate of arbitration costs had included the cost of clerks' office time to log in arbitration awards and appeals and the arbitrators' time billed at their normal rate.

Because reliable estimates of case processing costs typically are not available, most studies instead assess arbitration's impact on court resources indirectly, by examining possible indicators of court workload such as trial rates or the frequency of litigation events. A few studies also tried to assess arbitration's impact on the processing of non-arbitration cases.

A concern that is sometimes raised about court-connected arbitration is that it might increase the court's workload because the easier access to a hearing will encourage more litigants to file claims or to contest them. The only study to examine this issue found that the answer rate in cases subject to arbitration was higher than in comparable cases before the arbitration program began.<sup>64</sup>

In the six studies that examined the effect of arbitration on the trial rate, the findings were mixed. Four studies found that the trial rate was lower in arbitration cases than in comparable cases before the arbitration program began (by 4% to 14%);<sup>65</sup> two other studies found no difference in the trial rate.<sup>66</sup> The different findings across the studies appeared largely due to whether the trial rate was calculated as a percentage of contested cases or as a percentage of all cases.<sup>67</sup> When the trial rate was calculated as a proportion of contested cases, all of the studies found that arbitration cases had a lower trial rate than non-

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<sup>63</sup> Barkai & Kassebaum, 1992 at 27-30.

<sup>64</sup> Clarke et al., 1989, at 35.

<sup>65</sup> Clarke et al., 1991, at 160; Burton & McIver, 1990, at 19; Hanson & Keilitz, 1991, at 212, 214; Hanson et al., 1991, at 6.

<sup>66</sup> Barkai & Kassebaum, 1992, at 59; Collins et al., 1992, at 5.

<sup>67</sup> This may in part be because the trial rate for contested cases is larger than the trial rate for all cases, so there is more room for reduction.

arbitration cases.<sup>68</sup> By contrast, when the trial rate was calculated as a proportion of all cases filed, two of the three studies found no reduction in the trial rate in arbitration cases.<sup>69</sup> The jurisdictional limit for arbitration programs did not seem related to a reduction in the trial rate in arbitration cases, as both studies that found a reduction and those that did not included a wide range of jurisdictional limits.

Regardless of arbitration's impact on the trial rate, all studies reported that more cases in arbitration had a hearing on the merits (arbitration award, trial, or other judgment) than did cases in non-arbitration. Several studies found that two to three times as many cases in arbitration as in non-arbitration had an adjudication of their dispute,<sup>70</sup> while other studies found the difference to be even larger.<sup>71</sup> Two studies reported that the settlement rate for arbitration cases was substantially lower than the settlement rate for non-arbitration cases,<sup>72</sup> but two other studies found little or no difference in the settlement rate.<sup>73</sup> Findings of a substantial decline in the settlement rate with a smaller decline in the trial rate for arbitration cases compared to non-arbitration cases led some researchers to conclude that arbitration hearings were diverting more cases from settlement than from trial.<sup>74</sup>

Two studies explored the impact of the arbitration program on the processing of other cases. One study reported no reduction in the time to disposition for non-arbitration cases after the introduction of the arbitration program; in fact the average time to disposition for non-arbitration cases increased by one month.<sup>75</sup> A second study suggested that the average annual increase in the number of pending cases tended to be smaller after the introduction of the arbitration program than it was before its inception.<sup>76</sup> However, this

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<sup>68</sup> Clarke et al., 1991, at 160; Hanson & Keilitz, 1991, at 212, 214; Hanson et al., 1991, at 6.

<sup>69</sup> Barkai & Kassebaum, 1992, at 59; Burton & McIver, 1990, at 19; Collins et al., 1992, at 5.

<sup>70</sup> Clarke et al., 1991, at 160, 162; Burton & McIver, 1990, at 19; Hanson & Keilitz, 1991, at 212, 214.

<sup>71</sup> Barkai & Kassebaum, 1992, at 59; Collins et al., 1992, at 46-47; DeWitt et al., 1994, at 17.

<sup>72</sup> Barkai & Kassebaum, 1992, at 59; DeWitt et al., 1994, at 17.

<sup>73</sup> Burton & McIver, 1990, at 19; Clarke et al., 1991, at 160, 162.

<sup>74</sup> *See e.g.*, DeWitt et al., 1994, at 17.

<sup>75</sup> Hanson & Keilitz, 1991, at 217-218.

<sup>76</sup> Barkai & Kassebaum, 1992, at 42-43.

was true only if the year in which the court took extraordinary measures to reduce the backlog was excluded from the calculation; otherwise, pending cases would have increased at a higher rate after the introduction of arbitration.

## **5. Arbitration's Impact on Litigants' Costs**

Both studies that compared the actual hours lawyers worked and the amount of fees they billed in arbitration versus non-arbitration cases found no differences.<sup>77</sup> Neither the jurisdictional limit nor the type of cases handled by the program seemed to affect hours and fees, as one program had a \$15,000 jurisdictional limit and handled primarily debt collection cases while the other had a \$150,000 limit and handled tort cases.

Only one study had information on the number of depositions and discovery costs for both arbitration and non-arbitration cases, and it found that arbitration cases had fewer depositions and lower discovery costs than did non-arbitration cases.<sup>78</sup> One possible explanation for this reduction is that the arbitrator controlled discovery, although a majority of the lawyers instead attributed it to their voluntary agreements to limit discovery. An alternative explanation, however, is that it merely reflects differences in case complexity in the two groups of cases as a result of some cases being removed from arbitration, but not from non-arbitration, after assignment had occurred.<sup>79</sup>

In one of the above studies that reported no differences between arbitration and non-arbitration cases in lawyers' hours and fees, a majority of lawyers in arbitration nonetheless said they had worked and billed less than if the case had not been subject to arbitration.<sup>80</sup> This discrepancy between the objective data and lawyers' estimates raises doubts about the accuracy of their estimates. We report the following findings based on lawyers' estimates with this caveat in mind.

In four studies, lawyers were fairly evenly split between whether they thought their hours, fees, or litigation costs were the same or were lower in arbitration than if the case had not been in arbitration.<sup>81</sup> In only one study, in addition to the one mentioned above, did a majority of lawyers think their fees and litigation costs were lower in arbitration than if

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<sup>77</sup> Barkai & Kassebaum, 1992, at 33-34 (tried cases were excluded from both groups); Clarke et al., 1991, at 179.

<sup>78</sup> Barkai & Kassebaum, 1992, at 12-17.

<sup>79</sup> *Id.* at 13-14. The cases removed from arbitration after assignment had eight times as many depositions as cases that remained in the arbitration group and four times as many depositions as cases in the non-arbitration group.

<sup>80</sup> Clarke et al., 1991, at 179.

<sup>81</sup> Burton & McIver, 1990, at 38; Boersema et al., 1991, at 31-32; Collins et al., 1992, at 157-158; Simoni et al., 1988, at 573-576.



the case had not been in arbitration.<sup>82</sup> Not surprisingly, attorneys who had a contingency fee arrangement were more likely than those with an hourly fee arrangement to say that their fees would have been the same regardless of whether the case went to arbitration (83% vs.46%).<sup>83</sup>

When asked about specific litigation tasks, a majority of lawyers in one study thought they spent the same amount of time on each task in arbitration as they would have if the case were not in arbitration.<sup>84</sup> A majority of lawyers in other studies thought they did as much preparation for the arbitration hearing as they would have for trial.<sup>85</sup> In two studies, a majority of lawyers thought they spent as much time in discovery in arbitration as if the case were not in arbitration, but in another study the lawyers were evenly split between whether they spent the same or less time in discovery in arbitration.<sup>86</sup>

Among arbitration cases, discovery costs and lawyers' hours and fees varied depending on the point in the arbitration process at which cases were resolved.<sup>87</sup> Costs, hours, and fees were lower in cases that settled before an arbitration hearing than in cases that had a hearing, and were slightly lower in cases that accepted the award than in cases that appealed the award and subsequently settled.

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<sup>82</sup> DeWitt et al., 1994 at 69.

<sup>83</sup> Burton & McIver, 1990, at 38.

<sup>84</sup> Boersema et al., 1991, at 31-32.

<sup>85</sup> Collins et al., 1992, at 157-158; Simoni et al., 1988, at 575.

<sup>86</sup> Boersema et al., 1991, at 31-32; Collins et al., 1992, at 157-158; Simoni et al., 1988, at 575.

<sup>87</sup> Barkai & Kassebaum, 1992, at 19, 33-34.

## **6. Lawyers' Views of Arbitration**

Each of the studies that examined the views of lawyers who represented clients in court-connected arbitration reported highly favorable assessments. Most lawyers (86% to 96% across studies) thought the arbitration process, procedure, and rules were fair and that the arbitrator was impartial.<sup>88</sup> Fewer lawyers, but still a majority (60% to 82%), thought the arbitrator was highly qualified, had sufficient skills, had appropriate experience, was adequately prepared, understood the factual and legal issues, applied the law correctly, and was knowledgeable about procedures.<sup>89</sup> One study found that lawyers' ratings of the arbitrator did not vary depending on whether the arbitrator was a litigator or non-litigator, or typically represented plaintiffs or defendants.<sup>90</sup>

A majority of lawyers thought the outcome obtained in arbitration was fair (77% to 90%, with one study reporting 55%).<sup>91</sup> In the only study to ask whether the arbitrator's decision was based on the merits, a majority of lawyers said it was.<sup>92</sup> In most studies, a majority of lawyers were satisfied with the outcome (63% to 82%);<sup>93</sup> in one study, however, just under half of the lawyers were satisfied with the arbitrator's decision.<sup>94</sup> Half to three-fourths of the lawyers thought the outcome in arbitration was about the same as

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<sup>88</sup> Barkai & Kassebaum, 1992, at 47; Boersema et al., 1991, at 30; Burton & McIver, 1990, at 37-40; Clarke et al., 1991, at 179; Collins et al., 1992, at 146; DeWitt et al., 1994, at 39; Roehl et al., 1991, at 52-54; Simoni et al., 1988, at 565-568. The arbitration program studied by Simoni et al. included both general civil cases and domestic relations cases; because 85% of the lawyers surveyed were involved in arbitration in a civil case, we included this study.

<sup>89</sup> Barkai & Kassebaum, 1992, at 47; Boersema et al., 1991, at 32; Burton & McIver, 1990, at 37-40; Collins et al., 1992, at 146; DeWitt et al., 1994, at 41-42; Simoni et al., 1988, at 565-568.

<sup>90</sup> Barkai & Kassebaum, 1992, at 47.

<sup>91</sup> Boersema et al., 1991, at 31; Clarke et al., 1991, at 179; Collins et al., 1992, at 140; MacCoun et al., 1988, at 47-51; Roehl et al., 1991, at 52-54; Simoni et al., 1988, at 565-568. The lower proportion in the study reporting 55% may in part be a function of the scale points used. *See* Boersema et al., 1991, at 31. In a program in which the arbitrator determined what discovery could take place, few lawyers said that the arbitrators' decision to deny discovery affected the outcome of the case. *See* Barkai & Kassebaum, 1992, at 19.

<sup>92</sup> Barkai & Kassebaum, 1992, at 51.

<sup>93</sup> Burton & McIver, 1990, at 37-40; Collins et al., 1992, at 137; DeWitt et al., 1994, at 40.

<sup>94</sup> Boersema et al., 1991, at 32 (47%).

they expected or as the expected trial outcome.<sup>95</sup> Lawyers whose cases settled before an arbitration hearing were more satisfied with the outcome than were lawyers whose cases went to the hearing.<sup>96</sup>

Each of the four studies that compared the views of lawyers who had represented the plaintiff in arbitration with those of lawyers who had represented the defendant found that, on those dimensions where their views differed, plaintiffs' lawyers had more favorable assessments.<sup>97</sup> One study suggested that these differences might be attributable to arbitration outcomes; in that study, the plaintiff got some money in over 90% of awards.<sup>98</sup> Each of the studies that compared the views of lawyers and their clients reported that lawyers tended to have more favorable assessments of arbitration.<sup>99</sup>

Studies that compared the views of lawyers in arbitration cases with those of lawyers in non-arbitration cases, however, either found no differences in their views or found that lawyers in arbitration cases had *less* favorable assessments than lawyers in non-arbitration cases.<sup>100</sup>

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<sup>95</sup> Collins et al., 1992, at 144; DeWitt et al., 1994, at 40; MacCoun et al., 1988, at 55; Simoni et al., 1988, at 565-568.

<sup>96</sup> Collins et al., 1992, at 137; DeWitt et al., 1994, at 36, 40.

<sup>97</sup> Barkai & Kassebaum, 1992, at 44; Collins et al., 1992, at 137; MacCoun et al., 1988, at 51-54; Roehl et al., 1991, at 52-54.

<sup>98</sup> MacCoun et al., 1988, at 54.

<sup>99</sup> Burton & McIver, 1990, at 53; DeWitt et al., 1994, at 35-45, 58-63; MacCoun et al., 1988, at 50.

<sup>100</sup> Barkai & Kassebaum, 1992, at 44; Burton & McIver, 1990, at 35, 60; Clarke et al., 1991, at 179; Collins et al., 1992, at 122; DeWitt et al., 1994, at 35-45, 49-52.

## **7. Litigants' Views of Arbitration**

Each of the studies that examined litigants' views found they had favorable assessments of court-connected arbitration. A majority of litigants whose cases went to an arbitration hearing (68% to 87% across studies) thought the arbitration process, procedure, or rules were fair and that the arbitrator was impartial.<sup>101</sup> A majority of litigants (71% to 84%) thought the arbitrator was adequately prepared and understood the facts and the law.<sup>102</sup>

Fewer litigants, though still a majority in all but one study, thought the arbitration award was fair (59% to 70%) and were satisfied with the award (46% to 67%).<sup>103</sup>

Two studies that compared litigants whose cases settled before an arbitration hearing with litigants whose cases were resolved at or after a hearing tended to find essentially no differences in views of the outcome (*i.e.*, settlement versus award).<sup>104</sup> One study, however, found that litigants whose cases settled before an arbitration hearing had more favorable assessments of the outcome than did litigants whose cases were resolved by the award.<sup>105</sup> The one study that compared litigants' views of the fairness of the negotiation process versus the hearing process found that litigants whose cases settled before an arbitration hearing were less likely to say the process was fair than were litigants in cases that had an arbitration hearing.<sup>106</sup>

One study also compared the views of arbitration litigants whose cases were resolved by the arbitration award with those of litigants whose cases settled after the hearing or were resolved by trial *de novo*.<sup>107</sup> Litigants whose cases were resolved by trial had more favorable assessments of the outcome and were somewhat more likely to think the process was fair, than were litigants whose cases were resolved by the arbitration award. Litigants whose cases settled after the hearing but before trial had the lowest ratings of the outcome of all three groups.

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<sup>101</sup> Burton & McIver, 1990, at 45-49; Clarke et al., 1989, at 65; Collins et al., 1992, at 116; DeWitt et al., 1994, at 58-63; MacCoun et al., 1988, at 47-51; Roehl et al., 1991, at 62.

<sup>102</sup> Clarke et al., 1989, at 65; Collins et al., 1992, at 116; Simoni et al., 1988, at 562-563.

<sup>103</sup> Burton & McIver, 1990, at 45-49; Collins et al., 1992, at 101-102; Dewitt et al., 1994, at 58-63; Roehl et al., 1991, at 62; Simoni et al., 1988, at 562-563.

<sup>104</sup> DeWitt et al., 1994, at 58-63; Lind et al., 1990, at 966.

<sup>105</sup> Roehl et al., 1991, at 62-65.

<sup>106</sup> Lind et al., 1990, at 966.

<sup>107</sup> Roehl et al., 1991, at 62-65.

Studies that compared the views of litigants in arbitration cases with those of litigants in non-arbitration cases had mixed findings with regard to which group had more favorable assessments. One study that compared arbitration litigants' assessments of their arbitration hearing with non-arbitration litigants' assessments of their trial found that arbitration litigants were more likely to think the process was fair; the two groups of litigants did not differ, however, in their ratings of the outcome.<sup>108</sup> A second study found a different pattern: arbitration litigants whose cases went to a hearing had somewhat more favorable assessments of the decision than did non-arbitration litigants whose cases went to trial, but the two groups did not differ in their views of the fairness of the process.<sup>109</sup> A third study that compared all arbitration cases with all non-arbitration cases, regardless of the type of disposition, found that litigants in arbitration cases (71% of whom had a hearing) thought both the procedure and the outcome were more fair than did litigants in non-arbitration cases (45% of whom settled and 32% of whom had a trial).<sup>110</sup>

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<sup>108</sup> Collins et al., 1992, at 101-102, 116.

<sup>109</sup> Burton & McIver, 1990, at 45-49, 60.

<sup>110</sup> Clarke et al., 1991, at 179.

## **8. Summary: The Performance of Arbitration in Other States**

On every dimension of program performance, the research findings were mixed with regard to whether arbitration outperformed or simply did as well as traditional litigation. Our ability to draw conclusions about the relative effectiveness of court-connected arbitration versus traditional litigation was limited by the small number of studies with reliable comparative data for arbitration-eligible cases that did not go through arbitration. Few studies have systematically assessed the impact of different program structures on case processing or program performance.

Case processing statistics were examined to get a sense of the progression of cases through the arbitration process. The percentage of arbitration cases that went to a hearing ranged from 15% to 64%, the percentage of awards appealed ranged from 19% to 78%, and the percentage of appealed cases that had a trial *de novo* ranged from 3% to 45%. In most programs, defendants filed the majority of appeals, and they tended to improve their position at trial *de novo*. Both the hearing rate and the appeal rate tended to be higher for higher dollar-value cases, but did not vary by case type. The trial *de novo* rate, but not the appeal rate, seemed to vary depending on the appeal disincentive.

Five studies reported that the time to disposition was shorter for arbitration cases than for comparable cases not in arbitration, typically by three to seven months. Three studies, however, found no differences in the time to disposition. The program features that were more likely to be present in programs in which arbitration reduced the time to disposition than in programs that reported no time savings included discovery limits or arbitrator control of discovery, relatively short deadlines by which the arbitration hearing was to be held, and court coordination or scheduling of the arbitration hearing.

The point in the arbitration process at which cases were resolved affected their time to disposition. Arbitration cases that settled before the arbitration hearing tended to conclude two to six months faster than cases that went to a hearing. And cases that accepted the arbitration award were resolved three to ten months faster than cases that requested a trial *de novo*. Among appealed cases, those that settled before trial did not tend to conclude faster than those that went to trial.

Few studies examined arbitration's impact on court resources, and the findings of those that did tended to be mixed. The trial rate in arbitration cases was lower than in non-arbitration cases in four studies, but two other studies found no differences. More arbitration cases than non-arbitration cases had a hearing on the merits in all studies; whether the settlement rate in arbitration was lower or the same as in non-arbitration cases varied across the studies. The introduction of an arbitration program did not appear to reduce the time to disposition for non-arbitration cases or the pending caseload.

Arbitration did not reduce the hours lawyers worked or the fees they billed. In a program in which the arbitrator controlled discovery, the number of depositions and discovery costs was lower in arbitration than in non-arbitration cases. Lawyers were fairly evenly split between whether they thought their hours, fees, or litigation costs were the same or were lower in arbitration than if the case had not been in arbitration. Lawyers tended to think they spent as much time on various litigation tasks in arbitration cases as they would have if the cases were not subject to arbitration. Among arbitration cases, discovery costs and lawyers' hours and fees were lower in cases that settled before an arbitration hearing than in cases that had a hearing, and were slightly lower in cases that accepted the award than in cases that appealed the award and subsequently settled.

Lawyers who represented clients in cases in court-connected arbitration had highly favorable assessments. Most thought the arbitration rules and procedures were fair, the arbitrator was impartial, and the award was fair. A majority of lawyers had favorable ratings of the arbitrator's level of preparation, understanding of the factual and legal issues, and knowledge of procedures, but these ratings tended to be slightly lower than their fairness ratings. Where there were differences in their views, plaintiffs' lawyers had more favorable views than defense lawyers. In addition, the lawyers tended to have more favorable views than their clients. Lawyers whose cases settled before an arbitration hearing were more satisfied with the outcome than were lawyers whose cases went to the hearing. Studies that compared the views of lawyers in arbitration cases with those of lawyers in non-arbitration cases, however, either found no differences in their views or found that lawyers in arbitration cases had less favorable assessments than lawyers in non-arbitration cases.

A majority of litigants whose cases went to an arbitration hearing thought the arbitration process was fair and that the arbitrator was impartial, adequately prepared, and understood the facts and the law. Fewer litigants, though still a majority, thought the arbitration award was fair and were satisfied with it. Arbitration litigants whose cases settled before an arbitration hearing tended not to differ in their assessments of the outcome from litigants whose cases were resolved at or after a hearing, but litigants whose cases were resolved by trial *de novo* had more favorable views than did litigants whose cases were resolved by the award. Studies that compared the views of litigants in arbitration cases with those of litigants in non-arbitration cases reported mixed findings with regard to which group had more favorable assessments.

## **VI. Conclusion: How Well Is Arizona's Arbitration System Achieving Its Goals?**

The primary goals of court-connected arbitration in Arizona's Superior Courts include providing the faster and less expensive resolution of cases within the arbitration jurisdictional limit, as well as freeing up judicial resources to help relieve court congestion and delay for cases above the jurisdictional limit. Given the arbitration program's reliance on members of the State Bar of Arizona to serve as arbitrators, as well as the program's impact on those lawyers who represent clients in arbitration, lawyers' views are likely both to reflect and affect how well the arbitration system is performing.

Does arbitration resolve cases faster? Because there is no comparison group of cases under the arbitration jurisdictional limit that is resolved without the arbitration program, it is necessary to compare the time to disposition for cases subject to arbitration with cases above the jurisdictional limit that are resolved via the traditional litigation track. Tort and contract cases subject to arbitration are resolved several months faster than tort and contract cases not subject to arbitration. However, because of differences in the amount in controversy between cases subject versus not subject to arbitration, and the likely associated differences in case complexity and the amount of discovery, the faster resolution of cases subject to arbitration can not necessarily be attributed to the arbitration process. Moreover, cases subject to arbitration are not resolved quickly; in fact, they do not come close to meeting the Arizona Supreme Court's case processing time standard of resolving 90% of cases within nine months of filing the complaint. And the time to disposition is even longer for the subset of cases subject to arbitration that are still active at the time of assignment to arbitration.

What explains the long time to disposition for cases assigned to arbitration? First, it takes several months for an arbitrator to be appointed in a majority of cases; in the one-third of cases in which an arbitrator is struck or excused, it takes another month or two before a final appointment is made. Second, a sizeable proportion of cases do not settle before a hearing, and those that do tend to settle close to the hearing date. Third, fewer than half of the cases meet the statutory deadline by which the hearing is to take place; a majority of cases involve one or more continuances. Fourth, in a minority of cases the statutory deadlines for the arbitrator's filing the notice of decision and the award are not met. Fifth, a request for trial *de novo* (which is filed in 17% to 46% of cases, depending on the county) adds six to eight months to the time to disposition, even though few appeals proceed to trial.

What is arbitration's impact on court resources? Because there is no comparison group of cases under the arbitration jurisdictional limit that is resolved without the



arbitration program, it is necessary to estimate arbitration's impact on court resources from caseload and case processing statistics. The percentage of the courts' civil caseload that is diverted from the traditional litigation track to the arbitration program can provide a sense of arbitration's potential impact on the courts' caseload. Based on data from Maricopa County, the only county for which data on cases subject to arbitration were available, cases *subject* to arbitration comprise approximately 40% of all civil cases and 80% of tort and contract cases. Thus, a substantial proportion of the civil caseload is diverted to the arbitration program. Not all cases subject to arbitration use a substantial amount of court resources or would be likely to do so if there were no arbitration program. Thus, the *caseload* figures are not sufficient to provide a sense of arbitration's impact on the court's *workload*. Among cases subject to arbitration, there are three categories of case dispositions that impact court resources differently.

The first category of cases consists primarily of cases that are abandoned, dismissed or settled without assignment to arbitration. Based on a sample of Maricopa County tort and contract cases, these cases comprise the majority of cases subject to arbitration (61%). Cases that conclude prior to assignment to arbitration are resolved with presumably little involvement of the court and with no involvement of the arbitration program. If there were no arbitration program, it is reasonable to assume that most of these cases would resolve in the same fashion and with a similar, minimal level of court interaction, although a few might resolve even earlier. Thus, the arbitration program is unlikely to affect the amount of court resources used by this set of cases. An additional 5% of cases subject to arbitration are abandoned or dismissed after assignment to arbitration and before a hearing; presumably, the arbitration program also has no net effect on the court resources used by those cases.

The second category of cases are those in which parties appeal the arbitration award for a trial *de novo*. These cases represent a small proportion of tort and contract cases subject to arbitration (4%), and they presently consume considerable court resources. Most appealed cases are resolved before trial; however, some of them probably use court resources – either through settlement conferences or pretrial hearings – before they are dismissed. Again, it seems reasonable to assume that if there were no arbitration program, most of the appealed cases would resolve in the same fashion and with no less court interaction than at present. Some of these cases might in fact require additional court involvement as they would not have had the potential benefit of an arbitration hearing and award to help in the settlement process. However, the main savings in court resources the arbitration program provides for this group of cases is probably limited to pre-trial motions decided by the arbitrator, which occurs in approximately one-third of cases.

This leaves a third category of cases – those that settle after assignment to arbitration but before a hearing (14% of tort and contract cases subject to arbitration) and those that proceed to an arbitration hearing and either accept the award (12%) or settle before appeal (4%). At present, these cases use few court resources. Given that most contested tort and contract cases that are *not* subject to arbitration settle before trial, it seems reasonable to assume that these cases that presently settle without appeal also would settle if there were no arbitration program. The uncertainty is what level of court resources they would use before they settle. The arbitration program reduces court resources that would be required to decide pre-trial motions currently heard by arbitrators, which is in approximately one-third of these cases. Cases that presently settle prior to the arbitration hearing probably would settle without judicial intervention, although some might not settle until some court event has been scheduled. Cases that presently have an arbitration hearing and either accept the award or settle before appeal probably would use more court resources before they settle, and some might need a settlement conference or even a trial to reach resolution. Thus, the arbitration program's main potential for reducing court resources is for this subset of cases subject to arbitration (16%) that go to hearing but do not appeal.

What is arbitration's impact on litigants' costs? The present study could not examine this question directly; however, the preceding discussion of case processing provides some basis for estimating it. Arbitration is unlikely to have an impact on the litigation costs of most cases subject to arbitration that resolve without a hearing, as they would be likely to involve the same level of litigation activity as at present if there were no arbitration program. Thus, arbitration's primary potential to affect litigants' costs involves the 20% of tort and contract cases subject to arbitration that have a hearing. Given that most contested tort and contract cases that are *not* subject to arbitration settle without trial, it seems reasonable to assume that most of these cases would also settle without trial if there were no arbitration program. Accordingly, arbitration's impact on the costs for these litigants would depend on the relative transactional costs associated with an arbitration hearing versus settlement in the absence of the arbitration program. Overall, arbitration seems unlikely to decrease litigants' costs and could potentially increase costs, especially for the small group of litigants who appeal the award.

How do members of the State Bar of Arizona view court-connected arbitration? Lawyers who represent clients in arbitration have highly favorable assessments of the fairness of the arbitration process and neutrality of the arbitrator, and a majority think the awards are fair. A majority of lawyers feel arbitration use should remain mandatory, the jurisdictional limit should remain the same, and the time frame for the hearing is about right (despite the fact that a majority seek continuances). If arbitration use were made voluntary, a majority of the lawyers who represent clients in arbitration say they would sometimes or often recommend arbitration to their clients.

However, a majority of lawyers think arbitration should be replaced by a different type of mandatory ADR process, such as mediation, settlement conference, early neutral case evaluation, or short-trial, to be conducted by *pro tem* judges, commissioners, or other staff neutrals. And just over half of the lawyers think the appeal disincentive should be changed, although they are split between favoring an increase in the percentage by which an appealing party must improve its outcome versus favoring a decrease in that percentage or abolishing the disincentive altogether.

Both counsel representing clients in arbitration and lawyers serving as arbitrators express concerns about the adequacy of arbitrators' knowledge of the issues, arbitration procedures, and civil procedure more generally, and a majority support training for arbitrators and assignment based on subject matter expertise. Although most arbitrators feel both parties participate in good faith, a number identify other problems, including the attorneys' lack of preparation, minimal case presentation, and intent to appeal regardless of the award.

Many lawyers are dissatisfied with being required to serve as arbitrators, especially given the time they put into these cases and the pay they receive. A majority of arbitrators report difficulty scheduling the hearing. Most arbitrators spend more than half a day on cases that go to a hearing, and over one-third spend more than a day. Arbitrators who are unfamiliar with arbitration procedures or the area of law spend more time on cases than those with greater familiarity. A majority of arbitrators in Maricopa County do not bother to submit an invoice for payment, while a majority in the other counties receive \$75 for their service. A majority of lawyers think arbitrator service should be voluntary, and most think arbitrator compensation should be changed, either to a reasonable hourly rate for all time spent on the case or to no pay but non-monetary benefits. Fewer than half of the lawyers say they would be somewhat or very likely to serve voluntarily at the current rate of pay.

Are variations in program structure across the counties associated with differences in program performance? Whether courts assign cases to arbitration after the answer is filed or after the motion to set is filed does not seem to affect the proportion of civil cases assigned to arbitration, the hearing rate, or the speed with which cases progress once assigned to arbitration. Earlier assignment to arbitration, however, generally is related to a shorter time interval between the complaint and final disposition. Courts that monitor the hearing date and require a judge rather than the arbitrator to decide requests for a continuance do not find enhanced compliance with arbitration deadlines. Whether courts rely on voluntary versus mandatory arbitrator service or whether they assign arbitrators to cases according to their substantive expertise does not seem to affect the proportion of cases that strike an arbitrator, go to hearing, or appeal the award. Assigning arbitrators

based on subject matter is related to arbitrators' familiarity with the law in the case and familiarity with arbitration procedures, but not with counsels' assessments of the award.

How does the structure of Arizona's court-connected program compare to that of programs in other states? Arizona's program is fairly typical in terms of its jurisdictional limit, exclusion of cases seeking equitable relief, deadline for scheduling a hearing, relaxed hearing procedures, and disincentive for requesting a trial *de novo*. However, Arizona's program tends to differ on most aspects of arbitrator service, including allowing courts to require lawyers to serve as arbitrators, setting lower experience requirements for its arbitrators, and paying arbitrators less than most other states.

What light do studies conducted on arbitration programs in other states shed on the performance of court-connected arbitration generally? The research findings were mixed with regard to whether arbitration outperformed or simply did as well as traditional litigation on every dimension of program performance – time to disposition, use of court resources, litigant costs, and lawyers' and litigants' views of arbitration. This suggests that arbitration's effectiveness might depend on the structure of the arbitration program as well as the larger court case management context and legal practice culture in which it operates. Unfortunately, studies have not systematically examined the effect of these factors on arbitration program performance.

In sum, both in Arizona and in other states, court-connected arbitration does not appear to have a negative effect on the speed or cost of dispute resolution, use of court resources, or satisfaction of participants in most cases. It is less clear, however, whether court-connected arbitration substantially improves the efficiency or effectiveness of dispute resolution.